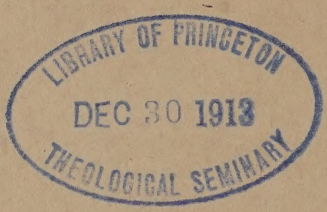

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THE

INSTITUTES OF JUSTINIAN

TRANSLATED INTO ENGLISH

WITH AN INDEX

BY

J. B. MOYLE, D.C.L.

OF LINCOLN'S INN, BARRISTER-AT-LAW
FELLOW AND LATE TUTOR OF NEW COLLEGE, OXFORD

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PREFACE

In writing this translation I have derived much assistance from Mr. Poste's translation of the Institutes of Gaius. Where, as is often the case, the words of the latter are transcribed literally or in substance by Justinian, I have frequently adopted Mr. Poste's rendering with very little if any alteration, and I must acknowledge once for all my debt to him. I have also consulted the translation of Mr. Sandars, and that by Mr. J. A. Cross embodied in Dr. Hunter's 'Roman Law', and have found Schrader's Commentary of great service in assisting me to bring out the full meaning of the more difficult parts of the text.

In the rendering of technical terms my usual plan has been to discover, if possible, some English equivalent which will fairly represent them: thus 'tutor' has been uniformly translated 'guardian', 'fideicommissum' 'fiduciary or trust bequest', &c. Where I have found this out of my power, I have not unfrequently adopted an English form of the original Latin word, where this (though probably not to be found in any English dictionary) has won an air of familiarity for itself by the usage of writers on Roman Law: e. g. 'adrogation', 'agnation'. Lastly, where I could do neither of these things, the original Latin term has been retained; as, for instance, in the names of many of the servitudes in Book II. 3, and in the Title on 'bonorum possessio' in Book III: and this has been done even in cases where (though a tolerable equivalent was at hand, as with the names of coins) the employment of an English word might appear somewhat grotesque.

J. B. M.

Oxford, *January*, 1883.

NOTE TO THE FOURTH EDITION

As I said in a note to the Second Edition of this translation, but few changes have been made in it since it was first published in 1883 as a portion of an edition of the Institutes. A few phrases have been altered, and one or two errors and omissions which have been pointed out to me have been corrected. But those who were good enough to review it in the Press as a rule found it both accurate and readable, and while most of the changes have been due to their criticisms, I have thought it best to accept their judgement, and reissue it substantially as it was when it first appeared.

J. B. M.

OXFORD, *December*, 1905.

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PROOEMIVM

IN the name of Our Lord Jesus Christ.

The Emperor Caesar Flavius Justinian, conqueror of the Alamanni, the Goths, the Franks, the Germans, the Antes, the Alani, the Vandals, the Africans, pious, prosperous, renowned, victorious, and triumphant, ever august,

To the youth desirous of studying the law:

The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace, and the ruler of Rome may not only be victorious over his enemies, but may show himself as scrupulously regardful of justice as triumphant over his conquered foes.

With deepest application and forethought, and by the 1
blessing of God, we have attained both of these objects. The barbarian nations which we have subjugated know our valour, Africa and other provinces without number being once more, after so long an interval, reduced beneath the sway of Rome by victories granted by Heaven, and themselves bearing witness to our dominion. All peoples too are ruled by laws which we have either enacted or arranged. Having removed 2
every inconsistency from the sacred constitutions, hitherto inharmonious and confused, we extended our care to the immense volumes of the older jurisprudence; and, like sailors crossing the mid-ocean, by the favour of Heaven have now completed a work of which we once despaired. When this, 3
with God's blessing, had been done, we called together that distinguished man Tribonian, master and ex-quaestor of our sacred palace, and the illustrious Theophilus and Dorotheus, professors of law, of whose ability, legal knowledge, and trusty observance of our orders we have received many and genuine proofs, and specially commissioned them to compose by our authority and advice a book of Institutes, whereby

you may be enabled to learn your first lessons in law no longer from ancient fables, but to grasp them by the brilliant light of imperial learning, and that your ears and minds may receive nothing useless or incorrect, but only what holds good in actual fact. And thus whereas in past time even the foremost of you were unable to read the imperial constitutions until after four years, you, who have been so honoured and fortunate as to receive both the beginning and the end of your legal teaching from the mouth of the Emperor, can
4 now enter on the study of them without delay. After the completion therefore of the fifty books of the Digest or Pandects, in which all the earlier law has been collected by the aid of the said distinguished Tribonian and other illustrious and most able men, we directed the division of these same Institutes into four books, comprising the first
5 elements of the whole science of law. In these the law previously obtaining has been briefly stated, as well as that which after becoming disused has been again brought to light
6 by our imperial aid. Compiled from all the Institutes of the ancient jurists, and in particular from the commentaries of our Gaius on both the Institutes and the common cases, and from many other legal works, these Institutes were submitted to us by the three learned men aforesaid, and after reading and examining them we have given them the fullest force of our constitutions.

7 Receive then these laws with your best powers and with the eagerness of study, and show yourselves so learned as to be encouraged to hope that when you have compassed the whole field of law you may have ability to govern such portion of the state as may be entrusted to you.

Given at Constantinople the 21st day of November, in the third consulate of the Emperor Justinian, Father of his Country, ever august.

BOOK I

TITLE I

OF JUSTICE AND LAW

JUSTICE is the set and constant purpose which gives to every man his due. Jurisprudence is the knowledge of things 1
divine and human, the science of the just and the unjust.

Having laid down these general definitions, and our object 2
being the exposition of the law of the Roman people, we think that the most advantageous plan will be to commence with an easy and simple path, and then to proceed to details with a most careful and scrupulous exactness of interpretation. Otherwise, if we begin by burdening the student's memory, as yet weak and untrained, with a multitude and variety of matters, one of two things will happen: either we shall cause him wholly to desert the study of law, or else we shall bring him at last, after great labour, and often, too, distrustful of his own powers (the commonest cause, among the young, of ill-success), to a point which he might have reached earlier, without such labour and confident in himself, had he been led along a smoother path.

The precepts of the law are these: to live honestly, to 3
injure no one, and to give every man his due. The study 4
of law consists of two branches, law public, and law private. The former relates to the welfare of the Roman State; the latter to the advantage of the individual citizen. Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome.

TITLE II

OF THE LAW OF NATURE, THE LAW OF NATIONS, AND THE CIVIL LAW

The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the

sea. Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law by the knowledge of which we see even the
1 lower animals are distinguished. The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations. Thus the laws of the Roman people are partly peculiar to itself, partly common to all nations; a distinction of which we shall take notice
2 as occasion offers. Civil law takes its name from the state wherein it binds; for instance, the civil law of Athens, it being quite correct to speak thus of the enactments of Solon or Draco. So too we call the law observed by the Roman people the civil law of the Romans, or the law of the Quirites; the law, that is to say, which they observe, the Romans being called Quirites after Quirinus. Whenever we speak, however, of civil law, without any qualification, we mean our own; exactly as, when 'the poet' is spoken of, without addition or qualification, the Greeks understand the great Homer, and we understand Vergil. But the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required. For instance, wars arose, and then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free. The law of nations again is the source of almost all contracts; for instance, sale, hire, partnership, deposit, loan for consumption, and very many others.

3 Our law is partly written, partly unwritten, as among the Greeks. The written law consists of statutes, plebiscites, senatusconsults, enactments of the Emperors, edicts of the magistrates, and answers of those learned in the law.
4 A statute is an enactment of the Roman people, which it used to make on the motion of a senatorial magistrate, as for instance a consul. A plebiscite is an enactment of the

commonalty, such as was made on the motion of one of their own magistrates, as a tribune. The commonalty differs from the people as a species from its genus; for 'the people' includes the whole aggregate of citizens, among them patricians and senators, while the term 'commonalty' embraces only such citizens as are not patricians or senators. After the passing, however, of the statute called the lex Hortensia, plebiscites acquired for the first time the force of statutes. A senatusconsult is a command and ordinance of 5
the senate, for when the Roman people had been so increased that it was difficult to assemble it together for the purpose of enacting statutes, it seemed right that the senate should be consulted instead of the people. Again, what the Emperor 6
determines has the force of a statute, the people having conferred on him all their authority and power by the *lex regia*, which was passed concerning his office and authority. Consequently, whatever the Emperor settles by rescript, or decides in his judicial capacity, or ordains by edicts, is clearly a statute: and these are what are called constitutions. Some of these of course are personal, and not to be followed as precedents, since this is not the Emperor's will; for a favour bestowed on individual merit, or a penalty inflicted for individual wrongdoing, or relief given without a precedent, do not go beyond the particular person: though others are general, and bind all beyond a doubt. The edicts of the 7
praetors too have no small legal authority, and these we are used to call the *ius honorarium*, because those who occupy posts of honour in the state, in other words the magistrates, have given authority to this branch of law. The curule aediles also used to issue an edict relating to certain matters, which forms part of the *ius honorarium*. The answers of 8
those learned in the law are the opinions and views of persons authorized to determine and expound the law; for it was of old provided that certain persons should publicly interpret the laws, who were called jurisconsults, and whom the Emperor privileged to give formal answers. If they were unanimous the judge was forbidden by imperial constitution to depart from their opinion, so great was its authority. The unwritten 9
law is that which usage has approved: for ancient customs,

when approved by consent of those who follow them, are like
10 statute. And this division of the civil law into two kinds seems not inappropriate, for it appears to have originated in the institutions of two states, namely Athens and Lacedaemon; it having been usual in the latter to commit to memory what was observed as law, while the Athenians observed only what they had made permanent in written statutes.

11 But the laws of nature, which are observed by all nations alike, are established, as it were, by divine providence, and remain ever fixed and immutable: but the municipal laws of each individual state are subject to frequent change, either by the tacit consent of the people, or by the subsequent enactment of another statute.

12 The whole of the law which we observe relates either to persons, or to things, or to actions. And first let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established.

TITLE III

OF THE LAW OF PERSONS

In the law of persons, then, the first division is into free
1 men and slaves. Freedom, from which men are called free, is a man's natural power of doing what he pleases, so far as
2 he is not prevented by force or law: slavery is an institution of the law of nations, against nature subjecting one man to
3 the dominion of another. The name 'slave' is derived from the practice of generals to order the preservation and sale of captives, instead of killing them; hence they are also called *mancipia*, because they are taken from the enemy by the
4 strong hand. Slaves are either born so, their mothers being slaves themselves; or they become so, and this either by the law of nations, that is to say by capture in war, or by the civil law, as when a free man, over twenty years of age, collusively allows himself to be sold in order that he may
5 share the purchase money. The condition of all slaves is one and the same: in the conditions of free men there are many distinctions; to begin with, they are either free born, or made free.

Title IV

OF MEN FREE BORN

A freeborn man is one free from his birth, being the offspring of parents united in wedlock, whether both be free born or both made free, or one made free and the other free born. He is also free born if his mother be free, even though his father be a slave, and so also is he whose paternity is uncertain, being the offspring of promiscuous intercourse, but whose mother is free It is enough if the mother be free at the moment of birt though a slave at that of conception: and conversely if sh be free at the time of conception, and then becomes a slave before the birth of the child, the latter is held to be free born, on the ground that an unborn child ought not to be prejudiced by the mother's misfortune. Hence arose the question whether the child of a woman is born free, or a slave, who, while pregnant, is manumitted, and then becomes a slave again before delivery. Marcellus thinks he is born free, for it is enough if the mother of an unborn infant is free at any moment between conception and delivery: and this view is right. The status of a man born 1
free is not prejudiced by his being placed in the position of a slave and then being manumitted: for it has been decided that manumission cannot stand in the way of rights acquired by birth.

Title V

OF FREEDMEN

Those are freedmen, or made free, who have been manumitted from legal slavery. Manumission is the giving of freedom; for while a man is in slavery he is subject to the power once known as *manus*; and from that power he is set free by manumission. All this originated in the law of nations; for by natural law all men were born free—slavery, and by consequence manumission, being unknown. But afterwards slavery came in by the law of nations, and was followed by the boon of manumission; so that though we are all known by the common name of 'man', three classes of men came into existence with the law of nations, namely men

free born, slaves, and thirdly freedmen who had ceased to be
1 slaves. Manumission may take place in various ways; either in the holy church, according to the sacred constitutions, or by default in a fictitious vindication, or before friends, or by letter, or by testament or any other expression of a man's last will: and indeed there are many other modes in which freedom may be acquired, introduced by the constitutions of
2 earlier emperors as well as by our own. It is usual for slaves to be manumitted by their masters at any time, even when the magistrate is merely passing by, as for instance while the praetor or proconsul or governor of a province is going to the baths or the theatre.

3 Of freedmen there were formerly three grades; for those who were manumitted sometimes obtained a higher freedom fully recognized by the laws, and became Roman citizens; sometimes a lower form, becoming by the lex Iunia Norbana Latins; and sometimes finally a liberty still more circumscribed, being placed by the lex Aelia Sentia on the footing of enemies surrendered at discretion. This last and lowest class, however, has long ceased to exist, and the title of Latin also had become rare: and so in our goodness, which desires to raise and improve in every matter, we have amended this in two constitutions, and reintroduced the earlier usage; for in the earliest infancy of Rome there was but one simple type of liberty, namely that possessed by the manumitter, the only distinction possible being that the latter was free born, while the manumitted slave became a freedman. We have abolished the class of *dediticii*, or enemies surrendered at discretion, by our constitution, published among those our decisions, by which, at the suggestion of the eminent Tribonian, our quaestor, we have set at rest the disputes of the older law. By another constitution, which shines brightly among the imperial enactments, and suggested by the same quaestor, we have altered the position of the *Latini Iuniani*, and dispensed with all the rules relating to their condition; and have endowed with the citizenship of Rome all freedmen alike, without regard to the age of the person manumitted, the nature of the master's ownership, or the mode of manumission, in accordance with the earlier usage; with the

addition of many new modes in which freedom coupled with the Roman citizenship, the only kind of freedom now known may be bestowed on slaves.

TITLE VI

OF PERSONS UNABLE TO MANUMIT, AND THE CAUSES OF THEIR INCAPACITY

In some cases, however, manumission is not permitted; for an owner who would defraud his creditors by an intended manumission attempts in vain to manumit, the act being made of no effect by the lex Aelia Sentia. A master, however, 1
who is insolvent may institute one of his slaves heir in his will, conferring freedom on him at the same time, so that he may become free and his sole and necessary heir, provided no one else takes as heir under the will, either because no one else was instituted at all, or because the person instituted for some reason or other does not take the inheritance. And this was a judicious provision of the lex Aelia Sentia, for it was most desirable that persons in embarrassed circumstances, who could get no other heir, should have a slave as necessary heir to satisfy their creditors' claims, or that at least (if he did not do this) the creditors might sell the estate in the slave's name, so as to save the memory of the deceased from disrepute. The law is the same if a slave be instituted heir without 2
liberty being expressly given him, this being enacted by our constitution in all cases, and not merely where the master is insolvent; so that in accordance with the modern spirit of humanity, institution will be equivalent to a gift of liberty; for it is unlikely, in spite of the omission of the grant of freedom, that one should have wished the person whom one has chosen as one's heir to remain a slave, so that one should have no heir at all. If a person is insolvent at the time of 3
manumission, or becomes so by the manumission itself, this is manumission in fraud of creditors. It is, however, now settled law, that the gift of liberty is not avoided unless the intention of the manumitter was fraudulent, even though his property is in fact insufficient to meet his creditors' claims; for men often hope and believe that they are better off than they really are. Consequently, we understand a gift of

liberty to be avoided only when the creditors are defrauded both by the intention of the manumitter, and in fact: that is to say, by his property being insufficient to meet their claims.

4 The same lex Aelia Sentia makes it unlawful for a master under twenty years of age to manumit, except in the mode of fictitious vindication, preceded by proof of some legitimate
5 motive before the council. It is a legitimate motive of manumission if the slave to be manumitted be, for instance, the father or mother of the manumitter, or his son or daughter, or his natural brother or sister, or governor or nurse or teacher, or foster-son or foster-daughter or foster-brother, or a slave whom he wishes to make his agent, or a female slave whom he intends to marry; provided he marry her within six months, and provided that the slave intended as an agent is not less than seventeen years of age at the time of manu-
6 mission. When a motive for manumission, whether true or false, has once been proved, the council cannot withdraw its sanction.

7 Thus the lex Aelia Sentia having prescribed a certain mode of manumission for owners under twenty, it followed that though a person fourteen years of age could make a will, and therein institute an heir and leave legacies, yet he could not confer liberty on a slave until he had completed his twentieth year. But it seemed an intolerable hardship that a man who had the power of disposing freely of all his property by will should not be allowed to give his freedom to a single slave: wherefore we allow him to deal in his last will as he pleases with his slaves as with the rest of his property, and even to give them their liberty if he will. But liberty being a boon beyond price, for which very reason the power of manumission was denied by the older law to owners under twenty years of age, we have as it were selected a middle course, and permitted persons under twenty years of age to manumit their slaves by will, but not until they have completed their seventeenth and entered on their eighteenth year. For when ancient custom allowed persons of this age to plead on behalf of others, why should not their judgement be deemed sound enough to enable them to use discretion in giving freedom to their own slaves?

Title VII

OF THE REPEAL OF THE LEX FUFIA CANINIA

Moreover, by the lex Fufia Caninia a limit was placed on the number of slaves who could be manumitted by their master's testament: but this law we have thought fit to repeal, as an obstacle to freedom and to some extent invidious, for it was certainly inhuman to take away from a man on his deathbed the right of liberating the whole of his slaves, which he could have exercised at any moment during his lifetime, unless there were some other obstacle to the act of manumission.

Title VIII

OF PERSONS INDEPENDENT OR DEPENDENT

Another division of the law relating to persons classifies them as either independent or dependent. Those again who are dependent are in the power either of parents or of masters. Let us first then consider those who are dependent, for by learning who these are we shall at the same time learn who are independent. And first let us look at those who are in the power of masters.

Now slaves are in the power of masters, a power recognized 1
by the law of all nations, for all nations present the spectacle of masters invested with power of life and death over slaves; and to whatever is acquired through a slave his owner is entitled. But in the present day no one under our sway 2
is permitted to indulge in excessive harshness towards his slaves, without some reason recognized by law; for, by a constitution of the Emperor Antoninus Pius, a man is made as liable to punishment for killing his own slave as for killing the slave of another person; and extreme severity on the part of masters is checked by another constitution whereby the same Emperor, in answer to inquiries from presidents of provinces concerning slaves who take refuge at churches or statues of the Emperor, commanded that on proof of intolerable cruelty a master should be compelled to sell his slaves on fair terms, so as to receive their value. And both of these are reasonable enactments, for the public interest requires that no one should make an evil use of his own property.

The terms of the rescript of Antoninus to Aelius Marcianus are as follow:—'The powers of masters over their slaves ought to continue undiminished, nor ought any man to be deprived of his lawful rights; but it is the master's own interest that relief justly sought against cruelty, insufficient sustenance, or intolerable wrong, should not be denied. I enjoin you then to look into the complaints of the slaves of Iulius Sabinus, who have fled for protection to the statue of the Emperor, and if you find them treated with undue harshness or other ignominious wrong, order them to be sold, so that they may not again fall under the power of their master; and the latter will find that if he attempts to evade this my enactment, I shall visit his offence with severe punishment.'

TITLE IX

OF PATERNAL POWER

Our children whom we have begotten in lawful wedlock are
1 in our power. Wedlock or matrimony is the union of male and female, involving the habitual intercourse of daily life.
2 The power which we have over our children is peculiar to
3 Roman citizens, and is found in no other nation. The offspring then of you and your wife is in your power, and so too is that of your son and his wife, that is to say, your grandson and granddaughter, and so on. But the offspring of your daughter is not in your power, but in that of its own father.

TITLE X

OF MARRIAGE

Roman citizens are joined together in lawful wedlock when they are united according to law, the man having reached years of puberty, and the woman being of a marriageable age, whether they be independent or dependent: provided that, in the latter case, they must have the consent of the parents in whose power they respectively are, the necessity of which, and even of its being given before the marriage takes place, is recognized no less by natural reason than by law. Hence the question has arisen, can the daughter or son of a lunatic lawfully contract marriage? and as the doubt still remained

with regard to the son, we decided that, like the daughter, the son of a lunatic might marry even without the intervention of his father, according to the mode prescribed by our constitution.

It is not every woman that can be taken to wife: for marriage 1
with certain classes of persons is forbidden. Thus, persons related as ascendant and descendant are incapable of lawfully intermarrying; for instance, father and daughter, grandfather and granddaughter, mother and son, grandmother and grandson, and so on *ad infinitum*; and the union of such persons is called criminal and incestuous. And so absolute is the rule, that persons related as ascendant and descendant merely by adoption are so utterly prohibited from intermarriage that dissolution of the adoption does not dissolve the prohibition: so that an adoptive daughter or granddaughter cannot be taken to wife even after emancipation.

Collateral relations also are subject to similar prohibitions, 2
but not so stringent. Brother and sister indeed are prohibited from intermarriage, whether they are both of the same father and mother, or have only one parent in common: but though an adoptive sister cannot, during the subsistence of the adoption, become a man's wife, yet if the adoption is dissolved by her emancipation, or if the man is emancipated, there is no impediment to their intermarriage. Consequently, if a man wished to adopt his son-in-law, he ought first to emancipate his daughter: and if he wished to adopt his daughter-in-law, he ought first to emancipate his son. A man may not marry 3
his brother's or his sister's daughter, or even his or her granddaughter, though she is in the fourth degree; for when we may not marry a person's daughter, we may not marry the granddaughter either. But there seems to be no obstacle to a man's marrying the daughter of a woman whom his father has adopted, for she is no relation of his by either natural or civil law. The children of two brothers or sisters, or of 4
a brother and sister, may lawfully intermarry. Again, a man 5
may not marry his father's sister, even though the tie be merely adoptive, or his mother's sister: for they are considered to stand in the relation of ascendants. For the same reason too a man may not marry his great-aunt either paternal or maternal. Certain marriages again are prohibited on the 6

ground of affinity, or the tie between a man or his wife and the kin of the other respectively. For instance, a man may not marry his wife's daughter or his son's wife, for both are to him in the position of daughters. By wife's daughter or son's wife we must be understood to mean persons who have been thus related to us; for if a woman is still your daughter-in-law, that is, is still married to your son, you cannot marry her for another reason, namely, because she cannot be the wife of two persons at once. So too if a woman is still your stepdaughter, that is, if her mother is still married to you, you cannot marry her for the same reason, namely, because
7 a man cannot have two wives at the same time. Again, it is forbidden for a man to marry his wife's mother or his father's wife, because to him they are in the position of a mother, though in this case too our statement applies only after the relationship has finally terminated ; otherwise, if a woman is still your stepmother, that is, is married to your father, the common rule of law prevents her from marrying you, because a woman cannot have two husbands at the same time: and if she is still your wife's mother, that is, if her daughter is still married to you, you cannot marry her because you cannot
8 have two wives at the same time. But a son of the husband by another wife, and a daughter of the wife by another husband, and vice versa, can lawfully intermarry, even though
9 they have a brother or sister born of the second marriage. If a woman who has been divorced from you has a daughter by a second husband, she is not your stepdaughter, but Iulian is of opinion that you ought not to marry her, on the ground that though your son's betrothed is not your daughter-in-law, nor your father's betrothed your stepmother, yet it is more decent and more in accordance with what is right to abstain
10 from intermarrying with them. It is certain that the rules relating to the prohibited degrees of marriage apply to slaves: supposing, for instance, that a father and daughter, or a brother
11 and sister, acquired freedom by manumission. There are also other persons who for various reasons are forbidden to intermarry, a list of whom we have permitted to be inserted in the books of the Digest or Pandects collected from the older law.
12 Alliances which infringe the rules here stated do not confer

the status of husband and wife, nor is there in such case either wedlock or marriage or dowry. Consequently children born of such a connexion are not in their father's power, but as regards the latter are in the position of children born of promiscuous intercourse, who, their paternity being uncertain, are deemed to have no father at all, and who are called bastards, either from the Greek word denoting illicit intercourse, or because they are fatherless. Consequently, on the dissolution of such a connexion there can be no claim for return of dowry. Persons who contract prohibited marriages are subjected to penalties set forth in our sacred constitutions.

Sometimes it happens that children who are not born in 13
their father's power are subsequently brought under it. Such for instance is the case of a natural son made subject to his father's power by being inscribed a member of the curia ; and so too is that of a child of a free woman with whom his father cohabited, though he could have lawfully married her, who is subjected to the power of his father by the subsequent execution of a dowry deed according to the terms of our constitution: and the same boon is in effect bestowed by that enactment on children subsequently born of the same marriage.

Title XI

OF ADOPTIONS

Not only natural children are subject, as we said, to paternal power, but also adoptive children. Adoption is of two forms, 1
being effected either by rescript of the Emperor, or by the judicial authority of a magistrate. The first is the mode in which we adopt independent persons, and this form of adoption is called adrogation: the second is the mode in which we adopt a person subject to the power of an ascendant, whether a descendant in the first degree, as a son or daughter, or in a remoter degree, as a grandson, granddaughter, great-grandson, or great-granddaughter. But by 2
the law, as now settled by our constitution, when a child in power is given in adoption to a stranger by his natural father, the power of the latter is not extinguished: no right passes to the adoptive father, nor is the person adopted in his power,

though we have given a right of succession in case of the adoptive father dying intestate. But if the person to whom the child is given in adoption by its natural father is not a stranger, but the child's own maternal grandfather, or, supposing the father to have been emancipated, its paternal grandfather, or its great-grandfather paternal or maternal, in this case, because the rights given by nature and those given by adoption are vested in one and the same person, the old power of the adoptive father is left unimpaired, the strength of the natural bond of blood being augmented by the civil one of adoption, so that the child is in the family and power of an adoptive father, between whom and himself
3 there existed antecedently the relationship described. When a child under the age of puberty is adopted by rescript of the Emperor, the adrogation is only permitted after cause shown, the goodness of the motive and the expediency of the step for the pupil being inquired into. The adrogation is also made under certain conditions; that is to say, the adrogator has to give security to a public agent or attorney of the people, that if the pupil should die within the age of puberty, he will return his property to the persons who would have succeeded him had no adoption taken place. The adoptive father again may not emancipate them unless upon inquiry they are found deserving of emancipation, or without restoring them their property. Finally, if he disinherits him at death, or emancipates him in his lifetime without just cause, he is obliged to leave him a fourth of his own property, besides that which he brought him when adopted, or by subsequent
4 acquisition. It is settled that a man cannot adopt another person older than himself, for adoption imitates nature, and it would be unnatural for a son to be older than his father. Consequently a man who desires either to adopt or to adrogate a son ought to be older than the latter by the full term of
5 puberty, or eighteen years. A man may adopt a person as grandson or granddaughter, or as great-grandson or great-granddaughter, and so on, without having a son at all him-
6 self; and similarly he may adopt another man's son as
7 grandson, or another man's grandson as son. If he wishes to adopt some one as grandson, whether as the son of an

adoptive son of his own, or of a natural son who is in his power, the consent of this son ought to be obtained, lest a family heir be thrust upon him against his will: but on the other hand, if a grandfather wishes to give a grandson by a son in adoption to some one else, the son's consent is not requisite. An adoptive child is in most respects in the 8
same position, as regards the father, as a natural child born in lawful wedlock. Consequently a man can give in adoption to another a person whom he has adopted by imperial rescript, or before the praetor or governor of a province, provided that in this latter case he was not a stranger (i. e. was a natural descendant) before he adopted him himself. Both forms of 9
adoption agree in this point, that persons incapable of procreation by natural impotence are permitted to adopt, whereas castrated persons are not allowed to do so. Again, women 10
cannot adopt, for even their natural children are not subject to their power; but by the imperial clemency they are enabled to adopt, to comfort them for the loss of children who have been taken from them. It is peculiar to adoption 11
by imperial rescript, that children in the power of the person adrogated, as well as their father, fall under the power of the adrogator, assuming the position of grandchildren. Thus Augustus did not adopt Tiberius until Tiberius had adopted Germanicus, in order that the latter might become his own grandson directly the second adoption was made. The old 12
writers record a judicious opinion contained in the writings of Cato, that the adoption of a slave by his master is equivalent to manumission. In accordance with this we have in our wisdom ruled by a constitution that a slave to whom his master gives the title of son by the solemn form of a record is thereby made free, although this is not sufficient to confer on him the rights of a son.

Title XII

OF THE MODES IN WHICH PATERNAL POWER IS EXTINGUISHED

Let us now examine the modes in which persons dependent on a superior become independent. How slaves are freed from the power of their masters can be gathered from what

has already been said respecting their manumission. Children under paternal power become independent at the parent's death, subject, however, to the following distinction. The death of a father always releases his sons and daughters from dependence; the death of a grandfather releases his grandchildren from dependence only provided that it does not subject them to the power of their father. Thus, if at the death of the grandfather the father is alive and in his power, the grandchildren, after the grandfather's death, are in the power of the father; but if at the time of the grandfather's death the father is dead, or not subject to the grandfather, the grandchildren will not fall under his power, but become independent.

1 As deportation to an island for some penal offence entails loss of citizenship, such removal of a man from the list of Roman citizens has, like his death, the effect of liberating his children from his power; and conversely, the deportation of a person subject to paternal power terminates the power of the parent. In either case, however, if the condemned person is pardoned by the grace of the Emperor, he recovers all his
2 former rights. Relegation to an island does not extinguish paternal power, whether it is the parent or the child who is
3 relegated. Again, a father's power is extinguished by his becoming a 'slave of punishment', for instance, by being
4 condemned to the mines or exposed to wild beasts. A person in paternal power does not become independent by entering the army or becoming a senator, for military service or consular dignity does not set a son free from the power of his father. But by our constitution the supreme dignity of the patriciate frees a son from power immediately on the receipt of the imperial patent; for who would allow anything so unreasonable as that, while a father is able by emancipation to release his son from the tie of his power, the imperial majesty should be unable to release from dependence on another the man whom it has selected as a father of the
5 State? Again, capture of the father by the enemy makes him a slave of the latter; but the status of his children is suspended by his right of subsequent restoration by postliminium; for on escape from captivity a man recovers all his former rights, and among them the right of paternal power

over his children, the law of postliminium resting on a fiction that the captive has never been absent from the state. But if he dies in captivity the son is reckoned to have been independent from the moment of his father's capture. So too, if a son or a grandson is captured by the enemy, the power of his ascendant is provisionally suspended, though he may again be subjected to it by postliminium. This term is derived from *limen* and *post*, which explains why we say that a person who has been captured by the enemy and has come back into our territories has returned by postliminium: for just as the threshold forms the boundary of a house, so the ancients represented the boundaries of the empire as a threshold; and this is also the origin of the term *limes*, signifying a kind of end and limit. Thus postliminium means that the captive returns by the same threshold at which he was lost. A captive who is recovered after a victory over the enemy is deemed to have returned by postliminium. Eman- 6
cipation also liberates children from the power of the parent. Formerly it was effected either by the observance of an old form prescribed by statute by which the son was fictitiously sold and then manumitted, or by imperial rescript. Our forethought, however, has amended this by a constitution, which has abolished the old fictitious form, and enabled parents to go directly to a competent judge or magistrate, and in his presence release their sons or daughters, grandsons or granddaughters, and so on, from their power. After this, the father has by the praetor's edict the same rights over the property of the emancipated child as a patron has over the property of his freedman: and if at the time of emancipation the child, whether son or daughter, or in some remoter degree of relationship, is beneath the age of puberty, the father becomes by the emancipation his or her guardian. It is to be noted, 7
however, that a grandfather who has both a son, and by that son a grandson or granddaughter, in his power, may either release the son from his power and retain the grandson or granddaughter, or retain the son and release the grandson or granddaughter, or emancipate both together; and a great-grandfather has the same latitude of choice. Again, if a father 8
gives a son whom he has in his power in adoption to the son's

natural grandfather or great-grandfather, in accordance with our constitution on this subject, that is to say, by declaring his intention, before a judge with jurisdiction in the matter, in the official records, and in the presence and with the consent of the person adopted, the natural father's power is thereby extinguished, and passes to the adoptive father, adoption by whom under these circumstances retains, as we said, all its
9 old legal consequences. It is to be noted, that if your daughter-in-law conceives by your son, and you emancipate or give the latter in adoption during her pregnancy, the child when born will be in your power; but if the child is conceived after its father's emancipation or adoption, it is in the power of its natural father or its adoptive grandfather, as the case
10 may be. Children, whether natural or adoptive, are only very rarely able to compel their parent to release them from his power.

TITLE XIII

OF GUARDIANSHIPS

Let us now pass on to another classification of persons. Persons not subject to power may still be subject either to guardians or to curators, or may be exempt from both forms of control. We will first examine what persons are subject to guardians and curators, and thus we shall know who are exempt from both kinds of control. And first of persons
1 subject to guardianship or tutelage. Guardianship, as defined by Servius, is authority and control over a free person, given and allowed by the civil law, in order to protect
2 one too young to defend himself: and guardians are those persons who possess this authority and control, their name being derived from their very functions; for they are called guardians as being protectors and defenders, just as those entrusted with the care of sacred buildings are called *aeditui*.
3 The law allows a parent to appoint guardians in his will for those children in his power who have not attained the age of puberty, without distinction between sons and daughters; but a grandson or granddaughter can receive a testamentary guardian only provided that the death of the testator does

not bring them under the power of their own father. Thus, if your son is in your power at the time of your death, your grandchildren by him cannot have a guardian given them by your will, although they are in your power, because your death leaves them in the power of their father. And as 4
in many other matters afterborn children are treated on the footing of children born before the execution of the will, so it is ruled that afterborn children, as well as children born before the will was made, may have guardians therein appointed to them, provided that if born in the testator's lifetime they would be family heirs and in his power. If 5
a testamentary guardian be given by a father to his emancipated son, he must be approved by the governor in all cases, though inquiry into the case is unnecessary.

TITLE XIV

WHO CAN BE APPOINTED GUARDIANS BY WILL

Persons who are in the power of others may be appointed testamentary guardians no less than those who are independent; and a man can also validly appoint one of his 1
own slaves as testamentary guardian, giving him at the same time his liberty; and even in the absence of express manumission his freedom is to be presumed to have been tacitly conferred on him, whereby his appointment becomes a valid act, although of course it is otherwise if the testator appointed him guardian in the erroneous belief that he was free. The appointment of another man's slave as guardian, without any addition or qualification, is void, though valid if the words 'when he shall be free' are added: but this latter form is ineffectual if the slave is the testator's own, the appointment being void from the beginning. If a lunatic or minor is 2
appointed testamentary guardian, he cannot act until, if a lunatic, he recovers his faculties, and, if a minor, he attains the age of twenty-five years.

There is no doubt that a guardian may be appointed for 3
and from a certain time, or conditionally, or before the institution of the heir. A guardian cannot, however, be ap- 4
pointed for a particular matter or business, because his duties

relate to the person, and not merely to a particular business or matter.

5 If a man appoints guardians to his sons or daughters, he is held to have intended them also for such as may be afterborn, for the latter are included in the terms son and daughter. In the case of grandsons, a question may arise whether they are implicitly included in an appointment of guardians to sons; to which we reply, that they are included in an appointment of guardians if the term used is 'children', but not if it is 'sons': for the words son and grandson have quite different meanings. Of course an appointment to afterborn children includes all children, and not sons only.

TITLE XV

OF THE STATUTORY GUARDIANSHIP OF AGNATES

In default of a testamentary guardian, the statute of the Twelve Tables assigns the guardianship to the nearest agnates,
1 who are hence called statutory guardians. Agnates are persons related to one another by males, that is, through their male ascendants; for instance, a brother by the same father, a brother's son, or such son's son, a father's brother, his son or son's son. But persons related only by blood through females are not agnates, but merely cognates. Thus the son of your father's sister is no agnate of yours, but merely your cognate, and vice versa; for children are members of their
2 father's family, and not of their mother's. It was said that the statute confers the guardianship, in case of intestacy, on the nearest agnates; but by intestacy must here be understood not only complete intestacy of a person having power to appoint a testamentary guardian, but also the mere omission to make such appointment, and also the case of a person appointed testamentary guardian dying in the testator's life-
3 time. Loss of status of any kind ordinarily extinguishes rights by agnation, for agnation is a title of civil law. Not every kind of loss of status, however, affects rights by cognation; because civil changes cannot affect rights annexed to a natural title to the same extent that they can affect those annexed to a civil one.

Title XVI

OF LOSS OF STATUS

Loss of status, or change in one's previous civil rights, is of three orders, greatest, minor or intermediate, and least. The greatest loss of status is the simultaneous loss of citizen- 1
ship and freedom, exemplified in those persons who by a terrible sentence are made 'slaves of punishment', in freedmen condemned for ingratitude to their patrons, and in those who allow themselves to be sold in order to share the purchase-money when paid. Minor or intermediate loss of 2
status is loss of citizenship unaccompanied by loss of liberty, and is incident to interdiction of fire and water and to deportation to an island. The least loss of status occurs when 3
citizenship and freedom are retained, but a man's domestic position is altered, and is exemplified by adrogation and emancipation. A slave does not suffer loss of status by 4
being manumitted, for while a slave he had no civil rights: and where the change is one of dignity, rather than of civil 5
rights, there is no loss of status; thus it is no loss of status to be removed from the senate.

When it was said that rights by cognation are not affected 6
by loss of status, only the least loss of status was meant; by the greatest loss of status they are destroyed—for instance, by a cognate's becoming a slave—and are not recovered even by subsequent manumission. Again, deportation to an island, which entails minor or intermediate loss of status, destroys rights by cognation. When agnates are entitled to be 7
guardians, it is not all who are so entitled, but only those of the nearest degree, though if all are in the same degree, all are entitled.

Title XVII

OF THE STATUTORY GUARDIANSHIP OF PATRONS

The same statute of the Twelve Tables assigns the guardianship of freedmen and freedwomen to the patron and his children, and this guardianship, like that of agnates, is called statutory guardianship; not that it is anywhere expressly enacted in that statute, but because its interpretation by the

jurists has procured for it as much reception as it could have obtained from express enactment: the fact that the inheritance of a freedman or freedwoman, when they die intestate, was given by the statute to the patron and his children, being deemed a proof that they were intended to have the guardianship also, partly because in dealing with agnates the statute coupled guardianship with succession, and partly on the principle that where the advantage of the succession is, there, as a rule, ought too to be the burden of the guardianship. We say 'as a rule', because if a slave below the age of puberty is manumitted by a woman, though she is entitled, as patroness, to the succession, another person is guardian.

Title XVIII

OF THE STATUTORY GUARDIANSHIP OF PARENTS

The analogy of the patron guardian led to another kind of so-called statutory guardianship, namely that of a parent over a son or daughter, or a grandson or granddaughter by a son, or any other descendant through males, whom he emancipates below the age of puberty: in which case he will be statutory guardian.

Title XIX

OF FIDUCIARY GUARDIANSHIP

There is another kind of guardianship known as fiduciary guardianship, which arises in the following manner. If a parent emancipates a son or daughter, a grandson or granddaughter, or other descendant while under the age of puberty, he becomes their statutory guardian: but if at his death he leaves male children, they become fiduciary guardians of their own sons, or brothers and sisters, or other relatives who had been thus emancipated. But on the decease of a patron who is statutory guardian his children become statutory guardians also; for a son of a deceased person, supposing him not to have been emancipated during his father's lifetime, becomes independent at the latter's death, and does not fall under the power of his brothers, nor, consequently, under their guardianship; whereas a freedman, had he remained

a slave, would at his master's death have become the slave of the latter's children. The guardianship, however, is not cast on these persons unless they are of full age, which indeed has been made a general rule in guardianship and curatorship of every kind by our constitution.

Title XX

OF ATILIAN GUARDIANS, AND THOSE APPOINTED UNDER THE LEX IULIA ET TITIA

Failing every other kind of guardian, at Rome one used to be appointed under the lex Atilia by the praetor of the city and the majority of the tribunes of the people; in the provinces one was appointed under the lex Iulia et Titia by the president of the province. Again, on the appointment of 1
a testamentary guardian subject to a condition, or on an appointment limited to take effect after a certain time, a substitute could be appointed under these statutes during the pendency of the condition, or until the expiration of the term: and even if no condition was attached to the appointment of a testamentary guardian, a temporary guardian could be obtained under these statutes until the succession had vested. In all these cases the office of the guardian so appointed determined as soon as the condition was fulfilled, or the term expired, or the succession vested in the heir. On 2
the capture of a guardian by the enemy, the same statutes regulated the appointment of a substitute, who continued in office until the return of the captive; for if he returned, he recovered the guardianship by the law of postliminium. But 3
guardians have now ceased to be appointed under these statutes, the place of the magistrates directed by them to appoint being taken, first, by the consuls, who began to appoint guardians to pupils of either sex after inquiry into the case, and then by the praetors, who were substituted for the consuls by imperial constitutions; for these statutes contained no provisions as to security to be taken from guardians for the safety of their pupils' property, or compelling them to accept the office in case of disinclination. Under the present 4
law, guardians are appointed at Rome by the prefect of the city, and by the praetor when the case falls within his juris-

diction; in the provinces they are appointed, after inquiry, by the governor, or by inferior magistrates at the latter's
5 behest if the pupil's property is of no great value. By our constitution, however, we have done away with all difficulties of this kind relating to the appointing person, and dispensed with the necessity of waiting for an order from the governor, by enacting that if the property of the pupil or adult does not exceed five hundred *solidi*, guardians or curators shall be appointed by the officers known as defenders of the city, along with the holy bishop of the place, or in the presence of other public persons, or by the magistrates, or by the judge of the city of Alexandria; security being given in the amounts required by the constitution, and those who take it being responsible if it be insufficient.

6 The wardship of children below the age of puberty is in accordance with the law of nature, which prescribes that persons of immature years shall be under another's guidance
7 and control. As guardians have the management of their pupils' business, they are liable to be sued on account of their administration as soon as the pupil attains the age of puberty.

TITLE XXI

OF THE AUTHORITY OF GUARDIANS

In some cases a pupil cannot lawfully act without the authority of his guardian, in others he can. Such authority, for instance, is not necessary when a pupil stipulates for the delivery of property, though it is otherwise where he is the promisor; for it is an established rule that the guardian's authority is not necessary for any act by which the pupil simply improves his own position, though it cannot be dispensed with where he proposes to make it worse. Consequently, unless the guardian authorizes all transactions generating bilateral obligations, such as sale, hire, agency, and deposit, the pupil is not bound, though he can compel the other contracting party to discharge his own obligation.
1 Pupils, however, require their guardian's authority before they can enter on an inheritance, demand the possession of goods, or accept an inheritance by way of trust, even though such

act be advantageous to them, and involves no chance of loss. If the guardian thinks the transaction will be beneficial to 2
his pupil, his authority should be given presently and on the spot. Subsequent ratification, or authority given by letter, has no effect. In case of a suit between guardian and pupil, 3
as the former cannot lawfully authorize an act in which he is personally concerned or interested, a curator is now appointed, in lieu of the old praetorian guardian, with whose co-operation the suit is carried on, his office determining as soon as it is decided.

Title XXII

OF THE MODES IN WHICH GUARDIANSHIP IS TERMINATED

Pupils of either sex are freed from guardianship when they reach the age of puberty, which the ancients were inclined to determine, in the case of males, not only by age, but also by reference to the physical development of individuals. Our majesty, however, has deemed it not unworthy of the purity of our times to apply in the case of males also the moral considerations which, even among the ancients, forbade in the case of females as indecent the inspection of the person. Consequently by the promulgation of our sacred constitution we have enacted that puberty in males shall be considered to commence immediately on the completion of the fourteenth year, leaving unaltered the rule judiciously laid down by the ancients as to females, according to which they are held fit for marriage after completing their twelfth year. Again, tutelage is terminated by adrogation or deportation 1
of the pupil before he attains the age of puberty, or by his being reduced to slavery or taken captive by the enemy. So too if a testamentary guardian be appointed to hold office 2
until the occurrence of a condition, on this occurrence his office determines. Similarly tutelage is terminated by the 3
death either of pupil or of guardian. If a guardian suffers 4
such a loss of status as entails loss of either liberty or citizenship, his office thereby completely determines. It is, however, only the statutory kind of guardianship which is destroyed by a guardian's undergoing the least loss of status, for instance, by his giving himself in adoption. Tutelage is

in every case put an end to by the pupil's suffering loss of
5 status, even of the lowest order. Testamentary guardians appointed to serve until a certain time lay down their office
6 when that time arrives. Finally, persons cease to be guardians who are removed from their office on suspicion, or who are enabled to lay down the burden of the tutelage by a reasonable ground of excuse, according to rules to be presently stated.

TITLE XXIII

OF CURATORS

Males, even after puberty, and females after reaching marriageable years, receive curators until completing their twenty-fifth year, because, though past the age fixed by law as the time of puberty, they are not yet old enough
1 to administer their own affairs. Curators are appointed by the same magistrates who appoint guardians. They cannot legally be appointed by will, though such appointment, if made, is usually confirmed by an order of the
2 praetor or governor of the province. A person who has reached the age of puberty cannot be compelled to have a curator, except for the purpose of conducting a suit: for curators, unlike guardians, can be appointed for a particular
3 matter. Lunatics and prodigals, even though more than twenty-five years of age, are by the statute of the Twelve Tables placed under their agnates as curators; but now, as a rule, curators are appointed for them at Rome by the prefect of the city or praetor, and in the provinces by the
4 governor, after inquiry into the case. Curators should also be given to persons of weak mind, to the deaf, the dumb, and those suffering from chronic disease, because they are
5 not competent to manage their own affairs. Sometimes even pupils have curators, as, for instance, when a statutory guardian is unfit for his office: for if a pupil already has one guardian, he cannot have another given him. Again, if a testamentary guardian, or one appointed by the praetor or governor, is not a good man of business, though perfectly honest in his management of the pupil's affairs, it is usual for a curator to be appointed to act with him. Again, curators

are usually appointed in the room of guardians temporarily excused from the duties of their office.

If a guardian is prevented from managing his pupil's affairs 6
by ill-health or other unavoidable cause, and the pupil is absent or an infant, the praetor or governor of the province will, at the guardian's risk, appoint by decree a person selected by the latter to act as agent of the pupil.

Title XXIV

OF THE SECURITY TO BE GIVEN BY GUARDIANS AND CURATORS

To prevent the property of pupils and of persons under curators from being wasted or diminished by their curators or guardians the praetor provides for security being given by the latter against maladministration. This rule, however, is not without exceptions, for testamentary guardians are not obliged to give security, the testator having had full opportunities of personally testing their fidelity and carefulness, and guardians and curators appointed upon inquiry are similarly exempted, because they have been expressly chosen as the best men for the place. If two or more are appointed by testament, or 1
by a magistrate upon inquiry, any one of them may offer security for indemnifying the pupil or person to whom he is curator against loss, and be preferred to his colleague, in order that he may either obtain the sole administration, or else induce his colleague to offer larger security than himself, and so become sole administrator by preference. Thus he cannot directly call upon his colleague to give security; he ought to offer it himself, and so give his colleague the option of receiving security on the one hand, or of giving it on the other. If none of them offer security, and the testator left directions as to which was to administer the property, this person must undertake it: in default of this, the office is cast by the praetor's edict on the person whom the majority of guardians or curators shall choose. If they cannot agree, the praetor must interpose. The same rule, authorizing a majority to elect one to administer the property, is to be applied where several are appointed after inquiry by a magistrate. It is 2
to be noted that, besides the liability of guardians and

curators to their pupils, or the persons for whom they act, for the management of their property, there is a subsidiary action against the magistrate accepting the security, which may be resorted to where all other remedies prove inadequate, and which lies against those magistrates who have either altogether omitted to take security from guardians or curators, or taken it to an insufficient amount. According to the doctrines stated by the jurists, as well as by imperial constitutions, this action may be brought against the magistrate's
3 heirs as well as against him personally; and these same constitutions ordain that guardians or curators who make default in giving security may be compelled to do so by legal dis-
4 traint of their goods. This action, however, will not lie against the prefect of the city, the praetor, or the governor of a province, or any other magistrate authorized to appoint guardians, but only against those to whose usual duties the taking of security belongs.

TITLE XXV

OF GUARDIANS' AND CURATORS' GROUNDS OF EXEMPTION

There are various grounds on which persons are exempted from serving the office of guardian or curator, of which the most common is their having a certain number of children, whether in power or emancipated. If, that is to say, a man has, in Rome, three children living, in Italy four, or in the provinces five, he may claim exemption from these, as from other public offices; for it is settled that the office of a guardian or curator is a public one. Adopted children cannot be reckoned for this purpose, though natural children given in adoption to others may: similarly grandchildren by a son may be reckoned, so as to represent their father, while those by a daughter may not. It is, however, only living children who avail to excuse their fathers from serving as guardian or curator; such as have died are of no account, though the question has arisen whether this rule does not admit of an exception where they have died in war; and it is agreed that this is so, but only where they have fallen on the field of battle: for these, because they have died for their country,
1 are deemed to live eternally in fame. The Emperor Marcus,

too, replied by rescript, as is recorded in his Semestria, that employment in the service of the Treasury is a valid excuse from serving as guardian or curator so long as that employment lasts. Again, those are excused from these offices who 2
are absent in the service of the state; and a person already guardian or curator who has to absent himself on public business is excused from acting in either of these capacities during such absence, a curator being appointed to act temporarily in his stead. On his return, he has to resume the burden of the tutelage, without being entitled to claim a year's exemption, as has been settled since the opinion of Papinian was delivered in the fifth book of his replies; for the year's exemption or vacation belongs only to such as are called to a new tutelage. By a rescript of the Emperor 3
Marcus persons holding any magistracy may plead this as a ground of exemption, though it will not enable them to resign an office of this kind already entered upon. No guardian or 4
curator can excuse himself on the ground of an action pending between himself and his ward, unless it relates to the latter's whole estate or to an inheritance. Again, a man who is 5
already guardian or curator to three persons without having sought after the office is entitled to exemption from further burdens of the kind so long as he is actually engaged with these, provided that the joint guardianship of several pupils, or administration of an undivided estate, as where the wards are brothers, is reckoned as one only. If a man can prove 6
that through poverty he is unequal to the burden of the office, this, according to rescripts of the imperial brothers and of the Emperor Marcus, is a valid ground of excuse. Ill- 7
health again is a sufficient excuse if it be such as to prevent a man from attending to even his own affairs: and the Em- 8
peror Pius decided by a rescript that persons unable to read ought to be excused, though even these are not incapable of transacting business. A man too is at once excused if he 9
can show that a father has appointed him testamentary guardian out of enmity, while conversely no one can in any case claim exemption who promised the ward's father that he would act as guardian to them: and it was settled by a rescript 10
of M. Aurelius and L. Verus that the allegation that one

was unacquainted with the pupil's father cannot be admitted
11 as a ground of excuse. Enmity against the ward's father, if extremely bitter, and if there was no reconciliation, is usually accepted as a reason for exemption from the office of guardian;
12 and similarly a person can claim to be excused whose status or civil rights have been disputed by the father of the ward
13 in an action. Again, a person over seventy years of age can claim to be excused from acting as guardian or curator, and by the older law persons less than twenty-five were similarly exempted. But our constitution, having forbidden the latter to aspire to these functions, has made excuses unnecessary. The effect of this enactment is that no pupil or person under twenty-five years of age is to be called to a statutory guardianship; for it was most incongruous to place persons under the guardianship or administration of those who are known themselves to need assistance in the management of their own affairs, and are themselves governed by others.
14 The same rule is to be observed with soldiers, who, even though they desire it, may not be admitted to the office of
15 guardian: and finally grammarians, rhetoricians, and physicians at Rome, and those who follow these callings in their own country and are within the number fixed by law, are exempted from being guardians or curators.

16 If a person who has several grounds of excuse wishes to obtain exemption, and some of them are not allowed, he is not prohibited from alleging others, provided he does this within the time prescribed. Those desirous of excusing themselves do not appeal, but ought to allege their grounds of excuse within fifty days next after they hear of their appointment, whatever the form of the latter, and whatever kind of guardians they may be, if they are within a hundred miles of the place where they were appointed: if they live at a distance of more than a hundred miles, they are allowed a day for every twenty miles, and thirty days in addition, but this time, as Scaevola has said, must never be so reckoned as to amount
17 to less than fifty days. A person appointed guardian is
18 deemed to be appointed to the whole patrimony; and after he has once acted as guardian he cannot be compelled against his will to become the same person's curator—not even if the

father who appointed him testamentary guardian added in the will that he made him curator too, as soon as the ward reached fourteen years of age—this having been decided by a rescript of the Emperors Severus and Antoninus. Another 19
rescript of the same emperors settled that a man is entitled to be excused from becoming his own wife's curator, even after intermeddling with her affairs. No man is discharged from 20
the burden of guardianship who has procured exemption by false allegations.

Title XXVI

OF GUARDIANS OR CURATORS WHO ARE SUSPECTED

The accusation of guardians or curators on suspicion originated in the statute of the Twelve Tables; the removal 1
of those who are accused on suspicion is part of the jurisdiction, at Rome, of the praetor, and in the provinces of their governors and of the proconsul's legate. Having shown what 2
magistrates can take cognizance of this subject, let us see what persons are liable to be accused on suspicion. All guardians are liable, whether appointed by testament or otherwise; consequently even a statutory guardian may be made the object of such an accusation. But what is to be said of a patron guardian? Even here we must reply that he too is liable; though we must remember that his reputation must be spared in the event of his removal on suspicion. The 3
next point is to see what persons may bring this accusation; and it is to be observed that the action partakes of a public character, that is to say, is open to all. Indeed, by a rescript of Severus and Antoninus even women are made competent to bring it, but only those who can allege a close tie of affection as their motive; for instance, a mother, nurse, grandmother, or sister. And the praetor will allow any woman to prefer the accusation in whom he finds an affection real enough to induce her to save a pupil from suffering harm, without seeming to be more forward than becomes her sex. Persons below the 4
age of puberty cannot accuse their guardians on suspicion; but by a rescript of Severus and Antoninus it has been permitted to those who have reached that age to deal thus with their curators, after taking the advice of their nearest

relations. A guardian is 'suspected' who does not faithfully discharge his tutorial functions, though he may be perfectly solvent, as was the opinion also of Julian. Indeed, Julian writes that a guardian may be removed on suspicion before he commences his administration, and a constitution has been issued in accordance with this view. A person removed from office on suspicion incurs infamy if his offence was fraud, but not if it was merely negligence. As Papinian held, on a person being accused on suspicion he is suspended from the administration until the action is decided. If a guardian or curator who is accused on suspicion dies after the commencement of the action, but before it has been decided, the action is thereby extinguished; and if a guardian fails to appear to a summons of which the object is to fix by judicial order a certain rate of maintenance for the pupil, the rescript of the Emperors Severus and Antoninus provides that the pupil may be put in possession of the guardian's property, and orders the sale of the perishable portions thereof after appointment of a curator. Consequently, a guardian may be removed as suspected who does not provide his pupil with sufficient maintenance. If, on the other hand, the guardian appears, and alleges that the pupil's property is too inconsiderable to admit of maintenance being decreed, and it is shown that the allegation is false, the proper course is for him to be sent for punishment to the prefect of the city, like those who purchase a guardianship by bribery. So too a freedman, convicted of having acted fraudulently as guardian of the sons or grandsons of his patron, should be sent to the prefect of the city for punishment. Finally, it is to be noted, that guardians or curators who are guilty of fraud in their administration must be removed from their office even though they offer to give security, for giving security does not change the evil intent of the guardian, but only gives him a larger space of time wherein he may injure the pupil's property: for a man's mere character or conduct may be such as to justify one's deeming him 'suspected'. No guardian or curator, however, may be removed on suspicion merely because he is poor, provided he is also faithful and diligent.

BOOK II

TITLE I

OF THE DIFFERENT KINDS OF THINGS

IN the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by natural law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by various titles, as will appear from what follows.

Thus, the following things are by natural law common 1
to all—the air, running water, the sea, and consequently the sea-shore. No one therefore is forbidden access to the sea-shore, provided he abstains from injury to houses, monuments, and buildings generally; for these are not, like the sea itself, subject to the law of nations. On the other 2
hand, all rivers and harbours are public, so that all persons have a right to fish therein. The sea-shore extends to 3
the limit of the highest tide in time of storm or winter. Again, the public use of the banks of a river, as of the river 4
itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it. Again, the public use of the sea-shore, as of 5
the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it. As 6

examples of things belonging to a society or corporation, and not to individuals, may be cited buildings in cities—theatres, racecourses, and such other similar things as belong to cities in their corporate capacity.

7 Things which are sacred, devoted to superstitious uses, or sanctioned, belong to no one, for what is subject to divine law
8 is no one's property. Those things are sacred which have been duly consecrated to God by His ministers, such as churches and votive offerings which have been properly dedicated to His service; and these we have by our constitution forbidden to be alienated or pledged, except to redeem captives from bondage. If any one attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred. The ground on which a sacred building is erected remains sacred even after the destruction of the building, as was declared also
9 by Papinian. Any one can devote a place to superstitious uses of his own free will, that is to say, by burying a dead body in his own land. It is not lawful, however, to bury in land which one owns jointly with some one else, and which has not hitherto been used for this purpose, without the other's consent, though one may lawfully bury in a common sepulchre even without such consent. Again, the owner may not devote a place to superstitious uses in which another has a usufruct, without the consent of the latter. It is lawful to bury in another man's ground, if he gives permission, and the ground thereby becomes religious even though he should not give his consent to the interment till after it has
10 taken place. Sanctioned things too, such as city walls and gates, are, in a sense, subject to divine law, and therefore are not owned by any individual. Such walls are said to be 'sanctioned', because any offence against them is visited with capital punishment; for which reason those parts of the laws in which we establish a penalty for their transgressors are called sanctions.

11 Things become the private property of individuals in many ways; for the titles by which we acquire ownership in them are some of them titles of natural law, which, as we said, is called the law of nations, while some of them are titles of

civil law. It will thus be most convenient to take the older law first: and natural law is clearly the older, having been instituted by nature at the first origin of mankind, whereas civil laws first came into existence when states began to be founded, magistrates to be created, and laws to be written.

Wild animals, birds, and fish, that is to say all the creatures 12
which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural reason admits the title of the first occupant to that which previously had no owner. So far as the occupant's title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it. It has been doubted whether a wild 13
animal becomes your property immediately you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it. Bees again are naturally wild; 14
hence if a swarm settles on your tree, it is no more considered yours, until you have hived it, than the birds which build their nests there, and consequently if it is hived by some one else, it becomes his property. So too any one may take the honey-combs which bees may chance to have made, though, of course, if you see some one coming on your land for this purpose, you have a right to forbid him entry before that

purpose is effected. A swarm which has flown from your hive is considered to remain yours so long as it is in your sight and easy of pursuit: otherwise it belongs to the first
15 person who catches it. Peafowl too and pigeons are naturally wild, and it is no valid objection that they are used to return to the same spots from which they fly away, for bees do this, and it is admitted that bees are wild by nature; and some people have deer so tame that they will go into the woods and yet habitually come back again, and still no one denies that they are naturally wild. With regard, however, to animals which have this habit of going away and coming back again, the rule has been established that they are deemed yours so long as they have the intent to return: for if they cease to have this intention they cease to be yours, and belong to the first person who takes them; and when they lose the habit they seem also to have lost the
16 intention of returning. Fowls and geese are not naturally wild, as is shown by the fact that there are some kinds of fowls and geese which we call wild kinds. Hence if your geese or fowls are frightened and fly away, they are considered to continue yours wherever they may be, even though you have lost sight of them; and any one who keeps them intending thereby to make a profit is held guilty of theft.
17 Things again which we capture from the enemy at once become ours by the law of nations, so that by this rule even free men become our slaves, though, if they escape from our power and return to their own people, they recover their
18 previous condition. Precious stones too, and gems, and all other things found on the sea-shore, become immediately by
19 natural law the property of the finder: and by the same law the young of animals of which you are the owner become your property also.

20 Moreover, soil which a river has added to your land by alluvion becomes yours by the law of nations. Alluvion is an imperceptible addition; and that which is added so gradually that you cannot perceive the exact increase from
21 one moment of time to another is added by alluvion. If, however, the violence of the stream sweeps away a parcel of your land and carries it down to the land of your neighbour

it clearly remains yours; though of course if in process of time it becomes firmly attached to your neighbour's land, and the trees which it carried with it strike root in the latter, they are deemed from that time to have become part and parcel thereof. When an island rises in the sea, though this 22
rarely happens, it belongs to the first occupant; for, until occupied, it is held to belong to no one. If, however (as often occurs), an island rises in a river, and it lies in the middle of the stream, it belongs in common to the landowners on either bank, in proportion to the extent of their riparian interest; but if it lies nearer to one bank than to the other, it belongs to the landowners on that bank only. If a river divides into two channels, and by uniting again these channels transform a man's land into an island, the ownership of that land is in no way altered: but if a river entirely leaves 23
its old channel, and begins to run in a new one, the old channel belongs to the landowners on either side of it in proportion to the extent of their riparian interest, while the new one acquires the same legal character as the river itself, and becomes public. But if after a while the river returns to its old channel, the new channel again becomes the property of those who possess the land along its banks. It is otherwise if 24
one's land is wholly flooded, for a flood does not permanently alter the nature of the land, and consequently if the water goes back the soil clearly belongs to its previous owner.

When a man makes a new object out of materials belonging 25
to another, the question usually arises, to which of them, by natural reason, does this new object belong—to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver, or bronze; or mead of his wine and honey; or a plaster or eyesalve out of his drugs; or cloth out of his wool; or a ship, a chest, or a chair out of his timber. After many controversies between the Sabinians and Proculians, the law has now been settled as follows, in accordance with the view of those who followed a middle course between the opinions of the two schools. If the new object can be reduced to the materials of which it was made, it belongs to the owner of the materials;

if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material—bronze, silver, or gold—of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey of which it was compounded. But if a man makes a new object out of materials which belong partly to him and partly to another—for instance, mead of his own wine and another's honey, or a plaster or eyesalve of drugs which are not all his own, or cloth of wool which belongs only in part to him—in this case there can be no doubt that the new object belongs to its creator, for he has contributed not only part
26 of the material, but the labour by which it was made. If, however, a man weaves into his own cloth another man's purple, the latter, though the more valuable, becomes part of the cloth by accession; but its former owner can maintain an action of theft against the purloiner, and also a condiction, or action for reparative damages, whether it was he who made the cloth, or some one else; for although the destruction of property is a bar to a real action for its recovery, it is no bar to a condiction against the thief and certain other
27 possessors. If materials belonging to two persons are mixed by consent—for instance, if they mix their wines, or melt together their gold or their silver—the result of the mixture belongs to them in common. And the law is the same if the materials are of different kinds, and their mixture consequently results in a new object, as where mead is made by mixing wine and honey, or electrum by mixing gold and silver; for even here it is not doubted that the new object belongs in common to the owners of the materials. And if it is by accident, and not by the intention of the owners, that materials have become mixed, the law is the same, whether
28 they were of the same or of different kinds. But if the corn of Titius has become mixed with yours, and this by mutual consent, the whole will belong to you in common, because the separate bodies or grains, which before belonged to one or the other of you in severalty, have by consent on both sides been made your joint property. If, however, the mixture was accidental, or if Titius mixed the two parcels of corn without

your consent, they do not belong to you in common, because the separate grains remain distinct, and their substance is unaltered; and in such cases the corn no more becomes common property than does a flock formed by the accidental mixture of Titius's sheep with yours. But if either of you keeps the whole of the mixed corn, the other can bring a real action for the recovery of such part of it as belongs to him, it being part of the province of the judge to determine the quality of the wheat which belonged to each. If a man builds upon 29
his own ground with another's materials, the building is deemed to be his property, for buildings become a part of the ground on which they stand. And yet he who was owner of the materials does not cease to own them, but he cannot bring a real action for their recovery, or sue for their production, by reason of a clause in the Twelve Tables providing that no one shall be compelled to take out of his house materials (*tignum*), even though they belong to another, which have once been built into it, but that double their value may be recovered by the action called *de tigno iniuncto*. The term *tignum* includes every kind of material employed in building, and the object of this provision is to avoid the necessity of having buildings pulled down; but if through some cause or other they should be destroyed, the owner of the materials, unless he has already sued for double value, may bring a real action for recovery, or a personal action for production. On the other hand, if one man builds 30
a house on another's land with his own materials, the house belongs to the owner of the land. In this case, however, the right of the previous owner in the materials is extinguished, because he is deemed to have voluntarily parted with them, though only, of course, if he was aware that the land on which he was building belonged to another man. Consequently, though the house should be destroyed, he cannot claim the materials by real action. Of course, if the builder of the house has possession of the land, and the owner of the latter claims the house by real action, but refuses to pay for the materials and the workmen's wages, he can be defeated by the plea of fraud, provided the builder's possession is in good faith: for if he knew that the land belonged to some one else

it may be urged against him that he was to blame for rashly building on land owned to his knowledge by another man.
31 If Titius plants another man's shrub in land belonging to himself, the shrub will become his; and, conversely, if he plants his own shrub in the land of Maevius, it will belong to Maevius. In neither case, however, will the ownership be transferred until the shrub has taken root: for, until it has done this, it continues to belong to its original owner. So strict indeed is the rule that the ownership of the shrub is transferred from the moment it has taken root, that if a neighbour's tree grows so close to the land of Titius that the soil of the latter presses round it, whereby it drives its roots entirely into the same, we say the tree becomes the property of Titius, on the ground that it would be unreasonable to allow the owner of a tree to be a different person from the owner of the land in which it is rooted. Consequently, if a tree which grows on the boundaries of two estates drives its roots even partially into the neighbour's soil, it becomes
32 the common property of the two landowners. On the same principle corn is reckoned to become a part of the soil in which it is sown. But exactly as (according to what we said) a man who builds on another's land can defend himself by the plea of fraud when sued for the building by the owner of the land, so here too one who has in good faith and at his own expense put crops into another man's soil can shelter himself behind the same plea, if refused compensation for labour and
33 outlay. Writing again, even though it be in letters of gold, becomes a part of the paper or parchment, exactly as buildings and sown crops become part of the soil, and consequently if Titius writes a poem, or a history, or a speech on your paper or parchment, the whole will be held to belong to you, and not to Titius. But if you sue Titius to recover your books or parchments, and refuse to pay the value of the writing, he will be able to defend himself by the plea of fraud, provided that he obtained possession of the paper or parch-
34 ment in good faith. Where, on the other hand, one man paints a picture on another's board, some think that the board belongs, by accession, to the painter, others, that the painting, however great its excellence, becomes part of

the board. The former appears to us the better opinion, for it is absurd that a painting by Apelles or Parrhasius should be an accessory of a board which, in itself, is thoroughly worthless. Hence, if the owner of the board has possession of the picture, and is sued for it by the painter, who nevertheless refuses to pay the cost of the board, he will be able to repel him by the plea of fraud. If, on the other hand, the painter has possession, it follows from what has been said that the former owner of the board, [if he is to be able to sue at all], must claim it by a modified and not by a direct action; and in this case, if he refuses to pay the cost of the picture, he can be repelled by the plea of fraud, provided that the possession of the painter be in good faith; for it is clear, that if the board was stolen by the painter, or some one else, from its former owner, the latter can bring the action of theft.

If a man in good faith buys land from another who is not 35
its owner, though he believed he was, or acquires it in good faith by gift or some other lawful title, natural reason directs that the fruits which he has gathered shall be his, in consideration of his care and cultivation: consequently if the owner subsequently appears and claims the land by real action, he cannot sue for fruits which the possessor has consumed. This, however, is not allowed to one who takes possession of land which to his knowledge belongs to another person, and therefore he is obliged not only to restore the land, but to make compensation for fruits even though they have been consumed. A person who has a usufruct in land 36
does not become owner of the fruits which grow thereon until he has himself gathered them; consequently fruits which, at the moment of his decease, though ripe, are yet ungathered, do not belong to his heir, but to the owner of the land. What has been said applies also in the main to the lessee of land. The term 'fruits', when used of animals, com- 37
prises their young, as well as milk, hair, and wool; thus lambs, kids, calves, and foals, belong at once, by the natural law of ownership, to the fructuary. But the term does not include the offspring of a female slave, which consequently belongs to her master; for it seemed absurd to reckon human

beings as fruits, when it is for their sake that all other fruits
38 have been provided by nature. The usufructuary of a flock, as Julian held, ought to replace any of the animals which die from the young of the rest, and, if his usufruct be of land, to replace dead vines or trees; for it is his duty to cultivate according to law and use them like a careful head of a family.
39 If a man found a treasure in his own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it, as he also did to a man who found one by accident in soil which was sacred or religious. If he found it in another man's land by accident, and without specially searching for it, he gave half to the finder, half to the owner of the soil; and upon this principle, if a treasure were found in land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder; and consistently with this, if a man finds one in land which belongs to the imperial treasury or the people, half belongs to him, and half to the treasury or the State.
40 Delivery again is a mode in which we acquire things by natural law; for it is most agreeable to natural equity that where a man wishes to transfer his property to another person his wish should be confirmed. Consequently corporeal things, whatever be their nature, admit of delivery, and delivery by their owner makes them the property of the alienee; this, for instance, is the mode of alienating stipendiary and tributary estates, that is to say, estates lying in provincial soil; between which, however, and estates in Italy there now exists,
41 according to our constitution, no difference. And ownership is transferred whether the motive of the delivery be the desire to make a gift, to confer a dowry, or any other motive whatsoever. When, however, a thing is sold and delivered, it does not become the purchaser's property until he has paid the price to the vendor, or satisfied him in some other way, as by getting some one else to accept liability for him, or by pledge. And this rule, though laid down also in the statute of the Twelve Tables, is rightly said to be a dictate of the law of all nations, that is, of natural law. But if the vendor gives the purchaser credit, the goods sold belong to the latter
42 at once. It is immaterial whether the person who makes

delivery is the owner himself, or some one else acting with his consent. Consequently, if any one is entrusted by an 43
owner with the management of his business at his own free discretion, and in the execution of his commission sells and delivers any article, he makes the receiver its owner. In 44
some cases even the owner's bare will is sufficient, without delivery, to transfer ownership. For instance, if a man sells or makes you a present of a thing which he has previously lent or let to you or placed in your custody, though it was not from that motive he originally delivered it to you, yet by the very fact that he suffers it to be yours you at once become its owner as fully as if it had been originally delivered for the purpose of passing the property. So too if a man sells 45
goods lying in a warehouse, he transfers the ownership of them to the purchaser immediately he has delivered to the latter the keys of the warehouse. Nay, in some cases the will of 46
the owner, though directed only towards an uncertain person, transfers the ownership of the thing, as for instance when praetors and consuls throw money to a crowd: here they know not which specific coin each person will get, yet they make the unknown recipient immediate owner, because it is their will that each shall have what he gets. Accordingly, 47
it is true that if a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself: and a thing is said to be abandoned which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he immediately ceases to be owner. It is otherwise with things 48
which are thrown overboard during a storm, in order to lighten the ship; in the ownership of these things there is no change, because the reason for which they are thrown overboard is obviously not that the owner does not care to own them any longer, but that he and the ship besides may be more likely to escape the perils of the sea. Consequently any one who carries them off after they are washed on shore, or who picks them up at sea and keeps them, intending to make a profit thereby, commits a theft; for such things seem to be in much the same position as those which fall out of a carriage in motion unknown to their owners.

TITLE II

OF INCORPOREAL THINGS

Some things again are corporeal, and others incorporeal.
1 Those are corporeal which in their own nature are tangible, such as land, slaves, clothing, gold, silver, and others innumer-
2 able. Things incorporeal are such as are intangible: rights, for instance, such as inheritance, usufruct, and obligations, however acquired. And it is no objection to this definition that an inheritance comprises things which are corporeal; for the fruits of land enjoyed by a usufructuary are corporeal too, and obligations generally relate to the conveyance of something corporeal, such as land, slaves, or money, and yet the right of succession, the right of usufruct, and the right existing
3 in every obligation, are incorporeal. So too the rights appurtenant to land, whether in town or country, which are usually called servitudes, are incorporeal things.

TITLE III

OF SERVITUDES

The following are rights appurtenant to country estates: *iter*, the right of passage at will for a man only, not of driving beast or vehicles; *actus*, the right of driving beasts or vehicles (of which two the latter contains the former, though the former does not contain the latter, so that a man who has *iter* has not necessarily *actus*, while if he has *actus* he has also *iter*, and consequently can pass himself even though unaccompanied by cattle); *via*, which is the right of going, of driving any thing whatsoever, and of walking, and which thus contains both *iter* and *actus*; and fourthly, *aquaeductus*, the right of
1 conducting water over another man's land. Servitudes appurtenant to town estates are rights which are attached to buildings; and they are said to appertain to town estates because all buildings are called 'town estates', even though they are actually in the country. The following are servitudes of this kind—the obligation of a man to support the weight of his neighbour's house, to allow a beam to be let into his wall, or to receive the rain from his neighbour's roof on to

his own either in drops or from a shoot, or from a gutter into his yard ; the converse right of exemption from any of these obligations ; and the right of preventing a neighbour from raising his buildings, lest thereby one's ancient lights be obstructed. Some think that among servitudes appurtenant to 2 country estates ought properly to be reckoned the rights of drawing water, of watering cattle, of pasture, of burning lime, and of digging sand.

These servitudes are called rights attached to estates, 3 because without estates they cannot come into existence ; for no one can acquire or own a servitude attached to a town or country estate unless he has an estate for it to be attached to. When a landowner wishes to create any of these rights in 4 favour of his neighbour, the proper mode of creation is agreement followed by stipulation. By testament too one can impose on one's heir an obligation not to raise the height of his house so as to obstruct his neighbour's ancient lights, or bind him to allow a neighbour to let a beam into his wall, to receive the rain water from a neighbour's pipe, or allow a neighbour a right of way, of driving cattle or vehicles over his land, or conducting water over it.

TITLE IV

OF USUFRUCT

Usufruct is the right of using and taking the fruits of property not one's own, without impairing the substance of that property ; for being a right over a corporeal thing, it is necessarily extinguished itself along with the extinction of the latter. Usufruct is thus a right detached from the aggregate 1 of rights involved in ownership, and this separation can be effected in very many ways : for instance, if one man gives another a usufruct by legacy, the legatee has the usufruct, while the heir has merely the bare ownership ; and, conversely, if a man gives a legacy of an estate, reserving the usufruct, the usufruct belongs to the heir, while only the bare ownership is vested in the legatee. Similarly, he can give to one man a legacy of the usufruct, to another one of the estate, subject to the other's usufruct. If it is wished to

create a usufruct in favour of another person otherwise than by testament, the proper mode is agreement followed by stipulation. However, lest ownership should be entirely valueless through the permanent separation from it of the usufruct, certain modes have been approved in which usufruct may be
2 extinguished, and thereby revert to the owner. A usufruct may be created not only in land or buildings, but also in slaves, cattle, and other objects generally, except such as are actually consumed by being used, of which a genuine usufruct is impossible by both natural and civil law. Among them are wine, oil, grain, clothing, and perhaps we may also say coined money; for a sum of money is in a sense extinguished by changing hands, as it constantly does in simply being used. For convenience sake, however, the senate enacted that a usufruct could be created in such things, provided that due security be given to the heir. Thus if a usufruct of money be given by legacy, that money, on being delivered to the legatee, becomes his property, though he has to give security to the heir that he will repay an equivalent sum on his dying or undergoing a loss of status. And all things of this class, when delivered to the legatee, become his property, though they are first appraised, and the legatee then gives security that if he dies or undergoes a loss of status he will pay the value which was put upon them. Thus in point of fact the senate did not introduce a usufruct of such things, for that was beyond its power, but established a right analogous to
3 usufruct by requiring security. Usufruct determines by the death of the usufructuary, by his undergoing either of the greater kinds of loss of status, by its improper exercise, and by its non-exercise during the time fixed by law; all of which points are settled by our constitution. It is also extinguished when surrendered to the owner by the usufructuary (though transfer to a third person is inoperative); and again, conversely, by the fructuary becoming owner of the thing, this being called consolidation. Obviously, a usufruct of a house is extinguished by the house being burnt down, or falling through an earthquake or faulty construction; and in such a case a usufruct of the site cannot be
4 claimed. When a usufruct determines, it reverts to and is

reunited with the ownership; and from that moment he who before was but bare owner of the thing begins to have full power over it.

Title V

OF USE AND HABITATION

A bare use, or right of using a thing, is created in the same mode as a usufruct, and the modes in which it may determine are the same as those just described. A use is 1
a less right than a usufruct; for if a man has a bare use of an estate, he is deemed entitled to use the vegetables, fruit, flowers, hay, straw, and wood upon it only so far as his daily needs require: he may remain on the land only so long as he does not inconvenience its owner, or impede those who are engaged in its cultivation; but he cannot let or sell or give away his right to a third person, whereas a usufructuary may. Again, a man who has the use of a house is deemed entitled 2
only to live in it himself; he cannot transfer his right to a third person, and it scarcely seems to be agreed that he may take in a guest; but besides himself he may lodge there his wife, children, and freedmen, and other free persons who form as regular a part of his establishment as his slaves. Similarly, if a woman has the use of a house, her husband may dwell there with her. When a man has the use of 3
a slave, he has only the right of personally using his labour and services; in no way is he allowed to transfer his right to a third person, and the same applies to the use of beasts of burden. If a legacy be given of the use of a herd or of 4
a flock of sheep, the usuary may not use the milk, lambs, or wool, for these are fruits; but of course he may use the animals for the purpose of manuring his land.

If a right of habitation be given to a man by legacy or in 5
some other mode, this seems to be neither a use nor a usufruct, but a distinct and as it were independent right; and by a constitution which we have published in accordance with the opinion of Marcellus, and in the interests of utility, we have permitted persons possessed of this right not only to live in the building themselves, but also to let it out to others.

What we have here said concerning servitudes, and the 6

rights of usufruct, use, and habitation, will be sufficient; of inheritance and obligations we will treat in their proper places respectively. And having now briefly expounded the modes in which we acquire things by the law of nations, let us turn and see in what modes they are acquired by statute or by civil law.

TITLE VI

OF USUCAPION AND LONG POSSESSION

It was a rule of the civil law that if a man in good faith bought a thing, or received it by way of gift, or on any other lawful ground, from a person who was not its owner, but whom he believed to be such, he should acquire it by usucapion—if a movable, by one year's possession, and by two years' possession if an immovable, though in this case only if it were in Italian soil;—the reason of the rule being the inexpediency of allowing ownership to be long unascertained. The ancients thus considered that the periods mentioned were sufficient to enable owners to look after their property; but we have arrived at a better opinion, in order to save people from being over-quickly defrauded of their own, and to prevent the benefit of this institution from being confined to only a certain part of the empire. We have consequently published a constitution on the subject, enacting that the period of usucapion for movables shall be three years, and that ownership of immovables shall be acquired by long possession—possession, that is to say, for ten years, if both parties dwell in the same province, and for twenty years if in different provinces; and things may in these modes be acquired in full ownership, provided the possession commences on a lawful ground, not only in Italy but in every land subject to our sway.

1 Some things, however, notwithstanding the good faith of the possessor, and the duration of his possession, cannot be acquired by usucapion; as is the case, for instance, if one possesses a free man, a thing sacred or religious, or a runaway
2 slave. Things again of which the owner lost possession by theft, or possession of which was gained by violence, cannot be acquired by usucapion, even by a person who has possessed

them in good faith for the specified period: for stolen things are declared incapable of usucapion by the statute of the Twelve Tables and by the lex Atinia, and things taken with violence by the lex Iulia et Plautia. The statement that 3
things stolen or violently possessed cannot, by statute, be acquired by usucapion, means, not that the thief or violent dispossessor is incapable of usucapion—for these are barred by another reason, namely the fact that their possession is not in good faith; but that even a person who has purchased the thing from them in good faith, or received it on some other lawful ground, is incapable of acquiring by usucapion. Consequently, in things movable even a person who possesses in good faith can seldom acquire ownership by usucapion, for he who sells, or on some other ground delivers possession of a thing belonging to another, commits a theft. However, 4
this admits of exception; for if an heir, who believes a thing lent or let to, or deposited with, the person whom he succeeds, to be a portion of the inheritance, sells or gives it by way of dowry to another who receives it in good faith, there is no doubt that the latter can acquire the ownership of it by usucapion; for the thing is here not tainted with the flaw attaching to stolen property, because an heir does not commit a theft who in good faith conveys a thing away believing it to be his own. Again, the usufructuary of a female slave, who 5
believes her offspring to be his property, and sells or gives it away, does not commit a theft: for theft implies unlawful intention. There are also other ways in which one man can 6
transfer to another property which is not his own, without committing a theft, and thereby enable the receiver to acquire by usucapion. Usucapion of property classed among things 7
immovable is an easier matter; for it may easily happen that a man may, without violence, obtain possession of land which, owing to the absence or negligence of its owner, or to his having died and left no successor, is presently possessed by no one. Now this man himself does not possess in good faith, because he knows the land on which he has seized is certainly not his own: but if he delivers it to another who receives it in good faith, the latter can acquire it by long possession, because it has neither been stolen nor violently

possessed; for the idea held by some of the ancients, that a piece of land or a place can be stolen, has now been exploded, and imperial constitutions have been enacted in the interests of persons possessing immovables, to the effect that no one ought to be deprived of a thing of which he has
8 had long and unquestioned possession. Sometimes indeed even things which have been stolen or violently possessed can be acquired by usucapion, as for instance after they have again come under the power of their real owner: for by this they are relieved from the taint which had attached to them,
9 and so become capable of usucapion. Things belonging to our treasury cannot be acquired by usucapion. But there is on record an opinion of Papinian, supported by rescripts of the Emperors Pius, Severus, and Antoninus, that if, before the property of a deceased person who has left no heir is reported to the exchequer, some one has bought or received some
10 part thereof, he can acquire it by usucapion. Finally, it is to be observed that things are incapable of being acquired through usucapion by a purchaser in good faith, or by one who possesses on some other lawful ground, unless they are free from all flaws which vitiate the usucapion.

11 If there be a mistake as to the ground on which possession is acquired, and which it is wrongly supposed will support usucapion, usucapion cannot take place. Thus a man's possession may be founded on a supposed sale or gift, whereas in point of fact there has been no sale or gift at all.

12 Long possession which has begun to run in favour of a deceased person continues to run on in favour of his heir or praetorian successor, even though he knows that the land belongs to another person. But if the deceased's possession had not a lawful inception, it is not available to the heir or praetorian successor, although ignorant of this. Our constitution has enacted that in usucapion too a similar rule shall be observed, and that the benefit of the possession shall
13 continue in favour of the successor. The Emperors Severus and Antoninus have decided by a rescript that a purchaser too may reckon as his own the time during which his vendor has possessed the thing.

14 Finally, it is provided by an edict of the Emperor Marcus

that after an interval of five years a purchaser from the treasury of property belonging to a third person may repel the owner, if sued by him, by an exception. But a constitution issued by Zeno of sacred memory has protected persons who acquire things from the treasury by purchase, gift, or other title, affording them complete security from the moment of the transfer, and guaranteeing their success in any action relating thereto, whether they be plaintiffs or defendants; while it allows those who claim any action in respect of such property as owners or pledgees to sue the imperial treasury at any time within four years from the transaction. A divine constitution which we ourselves have lately issued has extended the operation of Zeno's enactment, respecting conveyances by the treasury, to persons who have acquired anything from our palace or that of the Empress.

TITLE VII

OF GIFTS

Another mode in which property is acquired is gift. Gifts are of two kinds; those made in contemplation of death, and those not so made. Gifts of the first kind are those made in 1
view of approaching death, the intention of the giver being that in the event of his decease the thing given should belong to the donee, but that if he should survive or should desire to revoke the gift, or if the donee should die first, the thing should be restored to him. These gifts in contemplation of death now stand on exactly the same footing as legacies; for as in some respects they were more like ordinary gifts, in others more like legacies, the jurists doubted under which of these two classes they should be placed, some being for gift, others for legacy: and consequently we have enacted by constitution that in nearly every respect they shall be treated like legacies, and shall be governed by the rules laid down respecting them in our constitution. In a word, a gift in contemplation of death is where the donor would rather have the thing himself than that the donee should have it, and that the latter should rather have it than his own heir. An illustration may be found in Homer, where Telemachus makes a gift to Piraeus.

2 Gifts which are made without contemplation of death, which we call gifts between the living, are of another kind, and have nothing in common with legacies. If the transaction be complete, they cannot be revoked at pleasure; and it is complete when the donor has manifested his intention, whether in writing or not. Our constitution has settled that such a manifestation of intention binds the donor to deliver, exactly as in the case of sale; so that even before delivery gifts are completely effectual, and the donor is under a legal obligation to deliver the object. Enactments of earlier emperors required that such gifts, if in excess of two hundred *solidi*, should be officially registered; but our constitution has raised this maximum to five hundred *solidi*, and dispensed with the necessity of registering gifts of this or of a less amount; indeed it has even specified some gifts which are completely valid, and require no registration, irrespective of their amount. We have devised many other regulations in order to facilitate and secure gifts, all of which may be gathered from the constitutions which we have issued on this topic. It is to be observed, however, that even where gifts have been completely executed we have by our constitution under certain circumstances enabled donors to revoke them, but only on proof of ingratitude on the part of the recipient of the bounty; the aim of this reservation being to protect persons, who have given their property to others, from suffering at the hands of these latter injury or loss in any of the modes detailed in our
3 constitution. There is another specific kind of gift between the living, with which the earlier jurists were quite unacquainted, and which owed its later introduction to more recent emperors. It was called gift before marriage, and was subject to the implied condition that it should not be binding until the marriage had taken place; its name being due to the fact that it was always made before the union of the parties, and could never take place after the marriage had once been celebrated. The first change in this matter was made by our imperial father Justin, who, as it had been allowed to increase dowries even after marriage, issued a constitution authorizing the increase of gifts before marriage during the continuance of the marriage tie in cases where an increase

had been made to the dowry. The name 'gift before marriage' was, however, still retained, though now inappropriate, because the increase was made to it after the marriage. We, however, in our desire to perfect the law, and to make names suit the things which they are used to denote, have by a constitution permitted such gifts to be first made, and not merely increased, after the celebration of the marriage, and have directed that they shall be called gifts 'on account of' (and not 'before') marriage, thereby assimilating them to dowries; for as dowries are not only increased, but actually constituted, during marriage, so now gifts on account of marriage may be not only made before the union of the parties, but may be first made as well as increased during the continuance of that union.

There was formerly too another civil mode of acquisition, 4
namely, by accrual, which operated in the following way: if a person who owned a slave jointly with Titius gave him his liberty himself alone by vindication or by testament, his share in the slave was lost, and went to the other joint owner by accrual. But as this rule was very bad as a precedent—for both the slave was cheated of his liberty, and the kinder masters suffered all the loss while the harsher ones reaped all the gain—we have deemed it necessary to suppress a usage which seemed so odious, and have by our constitution provided a merciful remedy, by discovering a means by which the manumitter, the other joint owner, and the liberated slave, may all alike be benefited. Freedom, in whose behalf even the ancient legislators clearly established many rules at variance with the general principles of law, will be actually acquired by the slave; the manumitter will have the pleasure of seeing the benefit of his kindness undisturbed; while the other joint owner, by receiving a money equivalent proportionate to his interest, and on the scale which we have fixed, will be indemnified against all loss.

TITLE VIII

OF PERSONS WHO MAY, AND WHO MAY NOT ALIENATE

It sometimes happens that an owner cannot alienate, and that a non-owner can. Thus the alienation of dowry land by

the husband, without the consent of the wife, is prohibited by the lex Iulia, although, since it has been given to him as dowry, he is its owner. We, however, have amended the lex Iulia, and thus introduced an improvement; for that statute applied only to land in Italy, and though it prohibited a mortgage of the land even with the wife's consent, it forbade it to be alienated only without her concurrence. To correct these two defects we have forbidden mortgages as well as alienations of dowry land even when it is situated in the provinces, so that such land can now be dealt with in neither of these ways, even if the wife concurs, lest the weakness of the female sex should be used as a means to the wasting
1 of their property. Conversely a pledgee, in pursuance of his agreement, may alienate the pledge, though not its owner; this, however, may seem to rest on the assent of the pledgor given at the inception of the contract, in which it was agreed that the pledgee should have a power of sale in default of repayment. But in order that creditors may not be hindered from pursuing their lawful rights, or debtors be deemed to be overlightly deprived of their property, provisions have been inserted in our constitution and a definite procedure established for the sale of pledges, by which the interests of both creditors
2 and debtors have been abundantly guarded. We must next observe that no pupil of either sex can alienate anything without his or her guardian's authority. Consequently, if a pupil attempts to lend money without such authority, no property passes, and he does not impose a contractual obligation; hence the money, if it exists, can be recovered by real action. If the money which he attempted to lend has been spent in good faith by the would-be borrower, it can be sued for by the personal action called condiction; if it has been fraudulently spent, the pupil can sue by personal action for its production. On the other hand, things can be validly conveyed to pupils of either sex without the guardian's authority; accordingly, if a debtor wishes to pay a pupil, he must obtain the sanction of the guardian to the transaction, else he will not be released. In a constitution which we issued to the advocates of Caesarea at the instance of the distinguished Tribonian, quaestor of our most sacred palace, it has with the

clearest reason been enacted, that the debtor of a pupil may safely pay a guardian or curator by having first obtained permission by the order of a judge, for which no fee is to be payable: and if the judge makes the order, and the debtor in pursuance thereof makes payment, he is completely protected by this form of discharge. Supposing, however, that the form of payment be other than that which we have fixed, and that the pupil, though he still has the money in his possession, or has been otherwise enriched by it, attempts to recover the debt by action, he can be repelled by the plea of fraud. If on the other hand he has squandered the money or had it stolen from him, the plea of fraud will not avail the debtor, who will be condemned to pay again, as a penalty for having carelessly paid without the guardian's authority, and not in accordance with our regulation. Pupils of either sex cannot validly satisfy a debt without their guardian's authority, because the money paid does not become the creditor's property; the principle being that no pupil is capable of alienation without his guardian's sanction.

Title IX

OF PERSONS THROUGH WHOM WE ACQUIRE

We acquire property not only by our own acts, but also by the acts of persons in our power, of slaves in whom we have a usufruct, and of freemen and slaves belonging to another but whom we possess in good faith. Let us now examine these cases in detail. Formerly, whatever was received by 1
a child in power of either sex, with the exception of military peculium, was acquired for the parent without any distinction; and the parent was entitled to give away or sell to one child, or to a stranger, what had been acquired through another, or dispose of it in any other way that he pleased. This, however, seemed to us to be a cruel rule, and consequently by a general constitution which we have issued we have improved the children's position, and yet reserved to parents all that was their due. This enacts that whatever a child gains by and through property, of which his father allows him the control, is acquired, according to the old practice, for the father alone; for what unfairness is there in property derived

from the father returning to him? But of anything which the child derives from any source other than his father, though his father will have a usufruct therein, the ownership is to belong to the child, that he may not have the mortification of seeing the gains which he has made by his own toil or good
2 fortune transferred to another. We have also made a new rule relating to the right which a father had under earlier constitutions, when he emancipated a child, of retaining absolutely, if he pleased, a third part of such property of the child as he himself had no ownership in, as a kind of consideration for emancipating him. The harsh result of this was that a son was by emancipation deprived of the ownership of a third of his property; and thus the honour which he got by being emancipated and made independent was balanced by the diminution in his fortune. We have therefore enacted that the parent, in such a case, shall no longer retain the ownership of a third of the child's property, but, in lieu thereof, the usufruct of one half; and thus the son will remain absolute owner of the whole of his fortune, while the father will reap a greater benefit than before, by being
3 entitled to the enjoyment of a half instead of a third. Again, all rights which your slaves acquire by tradition, stipulation, or any other title, are acquired for you, even though the acquisition be without your knowledge, or even against your will; for a slave, who is in the power of another person, can have nothing of his own. Consequently, if he is instituted heir, he must, in order to be able to accept the inheritance, have the command of his master; and if he has that command, and accepts the inheritance, it is acquired for his master exactly as if the latter had himself been instituted heir; and it is precisely the same with a legacy. And not only is ownership acquired for you by those in your power, but also possession; for you are deemed to possess everything of which they have obtained detention, and thus they are to you instruments through whom ownership may be acquired
4 by usucapion or long possession. Respecting slaves in whom a person has only a usufruct, the rule is, that what they acquire by means of the property of the usufructuary, or by their own work, is acquired for him; but what they acquire

by any other means belongs to their owner, to whom they belong themselves. Accordingly, if such a slave is instituted heir, or made legatee or donee, the succession, legacy, or gift is acquired, not for the usufructuary, but for the owner. And a man who in good faith possesses a free man or a slave belonging to another person has the same rights as a usufructuary; what they acquire by any other mode than the two we have mentioned belongs in the one case to the free man, in the other to the slave's real master. After a possessor in good faith has acquired the ownership of a slave by usucapion, everything which the slave acquires belongs to him without distinction; but a fructuary cannot acquire ownership of a slave in this way, because in the first place he does not possess the slave at all, but has merely a right of usufruct in him, and because in the second place he is aware of the existence of another owner. Moreover, you can acquire possession as well as ownership through slaves in whom you have a usufruct or whom you possess in good faith, and through free persons whom in good faith you believe to be your slaves, though as regards all these classes we must be understood to speak with strict reference to the distinction drawn above, and to mean only detention which they have obtained by means of your property or their own work. From this it appears that free men not subject to your power, 5
or whom you do not possess in good faith, and other persons' slaves, of whom you are neither usufructuaries nor just possessors, cannot under any circumstances acquire for you; and this is the meaning of the maxim that a man cannot be the means of acquiring anything for one who is a stranger in relation to him. To this maxim there is but one exception—namely, that, as is ruled in a constitution of the Emperor Severus, a free person, such as a general agent, can acquire possession for you, and that not only when you know, but even when you do not know of the fact of acquisition: and through this possession ownership can be immediately acquired also, if it was the owner who delivered the thing; and if it was not, it can be acquired ultimately by usucapion or by the plea of long possession.

So much at present concerning the modes of acquiring 6

rights over single things: for direct and fiduciary bequests, which are also among such modes, will find a more suitable place in a later portion of our treatise. We proceed therefore to the titles whereby an aggregate of rights is acquired. If you become the successors, civil or praetorian, of a person deceased, or adopt an independent person by adrogation, or become assignees of a deceased's estate in order to secure their liberty to slaves manumitted by his will, the whole estate of those persons is transferred to you in an aggregate mass. Let us begin with inheritances, whose mode of devolution is twofold, according as a person dies testate or intestate; and of these two modes we will first treat of acquisition by will. The first point which here calls for exposition is the mode in which wills are made.

TITLE X

OF THE EXECUTION OF WILLS

The term testament is derived from two words which mean a signifying of intention.

1 Lest the antiquities of this branch of law should be entirely forgotten, it should be known that originally two kinds of testaments were in use, one of which our ancestors employed in times of peace and quiet, and which was called the will made in the *comitia calata*, while the other was resorted to when they were setting out to battle, and was called *procinctum*. More recently a third kind was introduced, called the will by bronze and balance, because it was made by mancipation, which was a sort of fictitious sale, in the presence of five witnesses and a balance holder, all Roman citizens above the age of puberty, together with the person who was called the purchaser of the family. The two first-mentioned kinds of testament, however, went out of use even in ancient times, and even the third, or will by bronze and balance, though it has remained in vogue longer than they,
2 has become partly disused. All these three kinds of will which we have mentioned belonged to the civil law, but later still a fourth form was introduced by the praetor's edict; for the new law of the praetor, or *ius honorarium*, dispensed

with mancipation, and rested content with the seals of seven witnesses, whereas the seals of witnesses were not required by the civil law. When, however, by a gradual process the 3
civil and praetorian laws, partly by usage, partly by definite changes introduced by constitutions, came to be combined into a harmonious whole, it was enacted that a will should be valid which was wholly executed at one time and in the presence of seven witnesses (these two points being required, in a way, by the old civil law), to which the witnesses signed their names—a new formality imposed by imperial legislation—and affixed their seals, as had been required by the praetor's edict. Thus the present law of testament seems to be derived from three distinct sources; the witnesses, and the necessity of their all being present continuously through the execution of the will in order that that execution may be valid, coming from the civil law: the signing of the document by the testator and the witnesses being due to imperial constitutions, and the exact number of witnesses, and the sealing of the will by them, to the praetor's edict. An 4
additional requirement imposed by our constitution, in order to secure the genuineness of testaments and prevent forgery, is that the name of the heir shall be written by either the testator or the witnesses, and generally that everything shall be done according to the tenor of that enactment.

The witnesses may all seal the testament with the same 5
seal; for, as Pomponius remarks, what if the device on all seven seals were the same? It is also lawful for a witness to use a seal belonging to another person. Those persons only 6
can be witnesses who are legally capable of witnessing a testament. Women, persons below the age of puberty, slaves, lunatics, persons dumb or deaf, and those who have been interdicted from the management of their property, or whom the law declares worthless and unfitted to perform this office, cannot witness a will. In cases where one of the 7
witnesses to a will was thought free at the time of its execution, but was afterwards discovered to be a slave, the Emperor Hadrian, in his rescript to Catonius Verus, and afterwards the Emperors Severus and Antoninus declared that of their goodness they would uphold such a will as validly made;

for, at the time when it was sealed, this witness was admitted by all to be free, and, as such, had had his civil position
8 called in question by no man. A father and a son in his power, or two brothers who are both in the power of one father, can lawfully witness the same testament, for there can be no harm in several persons of the same family witnessing
9 together the act of a man who is to them a stranger. No one, however, ought to be among the witnesses who is in the testator's power, and if a son in power makes a will of military peculium after his discharge, neither his father nor any one in his father's power is qualified to be a witness; for it is not allowed to support a will by the evidence of
10 persons in the same family with the testator. No will, again, can be witnessed by the person instituted heir, or by any one in his power, or by a father in whose power he is, or by a brother under the power of the same father: for the execution of a will is considered at the present day to be purely and entirely a transaction between the testator and the heir. Through mistaken ideas on this matter the whole law of testamentary evidence fell into confusion: for the ancients, though they rejected the evidence of the purchaser of the family and of persons connected with him by the tie of power, allowed a will to be witnessed by the heir and persons similarly connected with him, though it must be admitted that they accompanied this privilege with urgent cautions against its abuse. We have, however, amended this rule, and enacted in the form of law what the ancients expressed in the form only of advice, by assimilating the heir to the old purchaser of the family, and have rightly forbidden the heir, who now represents that character, and all other persons connected with him by the tie referred to, to bear witness in a matter in which, in a sense, they would be witnesses in their own behalf. Accordingly, we have not allowed earlier constitutions on this subject to be inserted
11 in our Code. Legatees, and persons who take a benefit under a will by way of trust, and those connected with them, we have not forbidden to be witnesses, because they are not universal successors of the deceased: indeed, by one of our constitutions we have specially granted this privilege to them,

and, *a fortiori*, to persons in their power, or in whose power they are.

It is immaterial whether the will be written on a tablet, 12
paper, parchment, or any other substance: and a man may 13
execute any number of duplicates of his will, for this is sometimes necessary, though in each of them the usual formalities must be observed. For instance, a person setting out upon a voyage may wish to take a statement of his last wishes along with him, and also to leave one at home; and numberless other circumstances which happen to a man, and over which he has no control, will make this desirable. So 14
far of written wills. When, however, one wishes to make a will binding by the civil law, but not in writing, he may summon seven witnesses, and in their presence orally declare his wishes; this, it should be observed, being a form of will which has been declared by constitutions to be perfectly valid by civil law.

TITLE XI

OF SOLDIERS' WILLS

Soldiers, in consideration of their extreme ignorance of law, have been exempted by imperial constitutions from the strict rules for the execution of a testament which have been described. Neither the legal number of witnesses, nor the observance of the other rules which have been stated, is necessary to give force to their wills, provided, that is to say, that they are made by them while on actual service; this last qualification being a new though wise one introduced by our constitution. Thus, in whatever mode a soldier's last wishes are declared, whether in writing or orally, this is a binding will, by force of his mere intention. At times, however, when they are not employed on actual service, but are living at home or elsewhere, they are not allowed to claim this privilege: they may make a will, even though they be sons in power, in virtue of their service, but they must observe the ordinary rules, and are bound by the forms which we described above as requisite in the execution of the wills of civilians. Respecting the testaments of soldiers the Emperor 1
Trajan sent a rescript to Statilius Severus in the following

terms: 'The privilege allowed to soldiers of having their wills upheld, in whatever manner they are made, must be understood to be limited by the necessity of first proving that a will has been made at all; for a will can be made without writing even by civilians. Accordingly, with reference to the inheritance which is the subject of the action before you, if it can be shown that the soldier who left it, did in the presence of witnesses, collected expressly for the purpose, declare orally who he wished to be his heir, and on what slaves he wished to confer liberty, it may well be maintained that in this way he made an unwritten testament, and his wishes therein declared ought to be carried out. But if, as is so common in ordinary conversation, he said to some one, "I make you my heir", or, "I leave you all my property", such expressions cannot be held to amount to a testament, and the interest of the very soldiers, who are privileged in the way described, is the principal ground for rejecting such a precedent. For if it were admitted, it would be easy, after a soldier's death, to procure witnesses to affirm that they had heard him say he left his property to any one they pleased to name, and in this way it would be impossible to
2 discover the true intentions of the deceased.' A soldier too
3 may make a will though dumb or deaf. This privilege, however, which we have said soldiers enjoy, is allowed them by imperial constitutions only while they are engaged on actual service, and in camp life. Consequently, if veterans wish to make a will after their discharge, or if soldiers actually serving wish to do this away from camp, they must observe the forms prescribed for all citizens by the general law; and a testament executed in camp without formalities, that is to say, not according to the form prescribed by law, will remain valid only for one year after the testator's discharge. Supposing then that the testator died within a year, but that a condition, subject to which the heir was instituted, was not fulfilled within the year, would it be feigned that the testator was a soldier at the date of his decease, and the testament consequently be upheld? and this question we answer in the
4 affirmative. If a man, before going on actual service, makes an invalid will, and then during a campaign opens it, and

adds some new disposition, or cancels one already made, or in some other way makes it clear that he wishes it to be his testament, it must be pronounced valid, as being, in fact, a new will made by the man as a soldier. Finally, if a 5
soldier is adrogated, or, being a son in power, is emancipated, his previously executed will remains good by the fiction of a new expression of his wishes as a soldier, and is not deemed to be avoided by his loss of status.

It is, however, to be observed that earlier statutes and 6
imperial constitutions allowed to children in power in certain cases a civil peculium after the analogy of the military peculium, which for that reason was called quasi-military, and of which some of them were permitted to dispose by will even while under power. By an extension of this principle our constitution has allowed all persons who have a peculium of this special kind to dispose of it by will, though subject to the ordinary forms of law. By a perusal of this constitution the whole law relating to this privilege may be ascertained.

TITLE XII

OF PERSONS INCAPABLE OF MAKING WILLS

Certain persons are incapable of making a lawful will. For instance, those in the power of others are so absolutely incapable that they cannot make a testament even with the permission of their parents, with the exception of those whom we have enumerated, and particularly of children in power who are soldiers, and who are permitted by imperial constitutions to dispose by will of all they may acquire while on actual service. This was allowed at first only to soldiers on active service, by the authority of the Emperors Augustus and Nerva, and of the illustrious Emperor Trajan; afterwards, it was extended by an enactment of the Emperor Hadrian to veterans, that is, soldiers who had received their discharge. Accordingly, if a son in power makes a will of his military peculium, it will belong to the person whom he institutes as heir: but if he dies intestate, leaving no children or brothers surviving him, it will go to the parent in whose power he is, according to the ordinary rule. From this it can be under-

stood, that a parent has no power to deprive a son in his power of what he has acquired on service, nor can the parent's creditors sell or otherwise touch it; and when the parent dies it is not shared between the soldier's son and his brothers, but belongs to him alone, although by the civil law the peculium of a person in power is always reckoned as part of the property of the parent, exactly as that of a slave is deemed part of the property of his master, except of course such property of the son as by imperial constitutions, and especially our own, the parent is unable to acquire in absolute ownership. Consequently, if a son in power, not having a military or quasi-military peculium, makes a will, it is invalid, even though he is released from power before his decease.

1 Again, a person under the age of puberty is incapable of making a will, because he has no judgement, and so too is a lunatic, because he has lost his reason; and it is immaterial that the one reaches the age of puberty, and the other recovers his faculties, before his decease. If, however, a lunatic makes a will during a lucid interval, the will is deemed valid, and one is certainly valid which he made before he lost his reason: for subsequent insanity never avoids a duly executed

2 testament or any other disposition validly made. So too a spendthrift, who is interdicted from the management of his own affairs, is incapable of making a valid will, though one

3 made by him before being so interdicted holds good. The deaf, again, and the dumb cannot always make a will, though here we are speaking not of persons merely hard of hearing, but of total deafness, and similarly by a dumb person is meant one totally dumb, and not one who merely speaks with difficulty; for it often happens that even men of culture and learning by some cause or other lose the faculties of speech and hearing. Hence relief has been afforded them by our constitution, which enables them, in certain cases and in certain modes therein specified, to make a will and other lawful dispositions. If a man, after making his will, becomes dumb or deaf through ill health or any other cause, it re-

4 mains valid notwithstanding. A blind man cannot make a will, except by observing the forms introduced by a law

5 of our imperial father Justin. A will made by a prisoner

while in captivity with the enemy is invalid, even though he subsequently returns. One made, however, while he was in his own state is valid, if he returns, by the law of postliminium; if he dies in captivity it is valid by the lex Cornelia.

TITLE XIII

OF THE DISINHERISON OF CHILDREN

The law, however, is not completely satisfied by the observance of the rules hereinbefore explained. A testator who has a son in his power must take care either to institute him heir, or to specially disinherit him, for passing him over in silence avoids the will; and this rule is so strict, that even if the son die in the lifetime of the father no heir can take under the will, because of its original nullity. As regards daughters and other descendants of either sex by the male line, the ancients did not observe this rule in all its strictness; for if these persons were neither instituted nor disinherited, the will was not avoided, but they were entitled to come in with the instituted heirs, and to take a certain portion of the inheritance. And these persons the ascendant was not obliged to specially disinherit; he could disinherit them collectively by a general clause. Special disinherison may 1
be expressed in these terms—'Be Titius my son disinherited', or in these, 'Be my son disinherited,' without inserting the name, supposing there is no other son. Children born after the making of the will must also be either instituted heirs or disinherited, and in this respect are similarly privileged, that if a son or any other family heir, male or female, born after the making of the will, be passed over in silence, the will, though originally valid, is invalidated by the subsequent birth of the child, and so becomes completely void. Consequently, if the woman from whom a child was expected have an abortive delivery, there is nothing to prevent the instituted heirs from taking the inheritance. It was immaterial whether female family heirs born after the making of the will were disinherited specially or by a general clause, but if the latter mode be adopted, some legacy must be left them in order that they may not seem to have been passed over merely through inadvertence: but male family heirs

born after the making of the will, sons and other lineal descendants, are held not to be properly disinherited unless they are disinherited specially, thus: 'Be any son that shall
2 be born to me disinherited.' With children born after the making of the will are classed children who succeed to the place of a family heir, and who thus, by an event analogous to subsequent birth, become family heirs to an ancestor. For instance, if a testator have a son, and by him a grandson or granddaughter in his power, the son alone, being nearer in degree, has the right of a family heir, although the grandchildren are in the testator's power equally with him. But if the son die in the testator's lifetime, or is in some other way released from his power, the grandson and granddaughter succeed to his place, and thus, by a kind of subsequent birth, acquire the rights of family heirs. To prevent this subsequent avoidance of one's will, grandchildren by a son must be either instituted heirs or disinherited, exactly as, to secure the original validity of a testament, a son must be either instituted or specially disinherited; for if the son die in the testator's lifetime, the grandson and granddaughter take his place, and avoid the will just as if they were children born after its execution. And this disinherison was first allowed by the lex Iunia Vellaea, which explains the form which is to be used, and which resembles that employed in disin-
3 heriting family heirs born after the making of a will. It is not necessary, by the civil law, to either institute or disinherit emancipated children, because they are not family heirs. But the praetor requires all, females as well as males, unless instituted, to be disinherited, males specially, females collectively; and if they are neither appointed heirs nor disinherited as described, the praetor promises them possession
4 of goods against the will. Adopted children, so long as they are in the power of their adoptive father, are in precisely the same legal position as children born in lawful wedlock; consequently they must be either instituted or disinherited according to the rules stated for the disinherison of natural children. When, however, they have been emancipated by their adoptive father, they are no longer regarded as his children either by the civil law or by the praetor's edict.

Conversely, in relation to their natural father, so long as they remain in the adoptive family they are strangers, so that he need neither institute nor disinherit them : but when emancipated by their adoptive father, they have the same rights in the succession to their natural father as they would have had if it had been he by whom they were emancipated. Such was the law introduced by our predecessors. Deeming, 5
however, that between the sexes, to each of which nature assigns an equal share in perpetuating the race of man, there is in this matter no real ground of distinction, and marking that, by the ancient statute of the Twelve Tables, all were called equally to the succession on the death of their ancestor intestate (which precedent the praetors also seem to have subsequently followed), we have by our constitution introduced a simple system of the same kind, applying uniformly to sons, daughters, and other descendants by the male line, whether born before or after the making of the will. This requires that all children, whether family heirs or emancipated, shall be specially disinherited, and declares that their pretermission shall have the effect of avoiding the will of their parent, and depriving the instituted heirs of the inheritance, no less than the pretermission of children who are family heirs or have been emancipated, whether already born, or born after, though conceived before the making of the will. In respect of adoptive children we have introduced a distinction, which is explained in our constitution on adoptions.
If a soldier engaged on actual service makes a testament 6
without specially disinheriting his children, whether born before or after the making of the will, but simply passing them over in silence, though he knows that he has children, it is provided by imperial constitutions that his silent pretermission of them shall be equivalent to special disinherison.
A mother or maternal grandfather is not bound to institute 7
her or his children or grandchildren ; they may simply omit them, for silence on the part of a mother, or of a maternal grandfather or other ascendant, has the same effect as actual disinherison by a father. For neither by the civil law, nor by that part of the praetor's edict in which he promises children who are passed over possession of goods against the will, is

a mother obliged to disinherit her son or daughter if she does not institute them heirs, or a maternal grandfather to be equally precise with reference to grandchildren by a daughter: though such children and grandchildren, if omitted, have another remedy, which will shortly be explained.

TITLE XIV

OF THE INSTITUTION OF THE HEIR

A man may institute as his heirs either free men or slaves, and either his own slaves or those of another man. If he wished to institute his own slave it was formerly necessary, according to the more common opinion, that he should expressly give him his liberty in the will: but now it is lawful, by our constitution, to institute one's own slave without this express manumission—a change not due to any spirit of innovation, but to a sense of equity, and one whose principle was approved by Atilicinus, as is stated by Paulus in his books on Masurius Sabinus and on Plautius. Among a testator's own slaves is to be reckoned one of whom he is bare owner, the usufruct being vested in some other person. There is, however, one case in which the institution of a slave by his mistress is void, even though freedom be given him in the will, as is provided by a constitution of the Emperors Severus and Antoninus in these terms: 'Reason demands that no slave, accused of criminal intercourse with his mistress, shall be capable of being manumitted, before his sentence is pronounced, by the will of the woman who is accused of participating in his guilt: accordingly if he be instituted heir by that mistress, the institution is void.' Among 'other persons' slaves' is reckoned one in whom the testator has
1 a usufruct. If a slave is instituted heir by his own master, and continues in that condition until his master's decease, he becomes by the will both free, and necessary heir. But if the testator himself manumits him in his lifetime, he may use his own discretion about acceptance; for he is not a necessary heir, because, though he is named heir to the testament, it was not by that testament that he became free. If he has been alienated, he must have the order of his new master to accept, and then his master becomes heir through him, while

he personally becomes neither heir nor free, even though his freedom was expressly given him in the testament, because by alienating him his former master is presumed to have renounced the intention of enfranchising him. When another person's slave is instituted heir, if he continues in the same condition he must have the order of his master to accept; if alienated by him in the testator's lifetime, or after the testator's death but before acceptance, he must have the order of the alienee to accept; finally, if manumitted in the testator's lifetime, or after the testator's death but before acceptance, he may accept or not at his own discretion. A 2
slave who does not belong to the testator may be instituted heir even after his master's decease, because slaves who belong to an inheritance are capable of being instituted or made legatees; for an inheritance not yet accepted represents not the future heir but the person deceased. Similarly, the slave of a child conceived but not yet born may be instituted heir. If a slave belonging to two or more joint owners, both or all 3
of whom are legally capable of being made heirs or legatees, is instituted heir by a stranger, he acquires the inheritance for each and all of the joint owners by whose orders he accepts it in proportion to the respective shares in which they own him.

A testator may institute either a single heir, or as many 4
as he pleases. An inheritance is usually divided into twelve 5
ounces, and is denoted in the aggregate by the term *as*, and each fraction of this aggregate, ranging from the ounce up to the *as* or pound, has its specific name, as follows: *sextans* ($\frac{1}{6}$), *quadrans* ($\frac{1}{4}$), *triens* ($\frac{1}{3}$), *quincunx* ($\frac{5}{12}$), *semis* ($\frac{1}{2}$), *septunx* ($\frac{7}{12}$), *bes* ($\frac{2}{3}$), *dodrans* ($\frac{3}{4}$), *dextans* ($\frac{5}{6}$), *deunx* ($\frac{11}{12}$), and *as*. It is not necessary, however, that there should always be twelve ounces, for for the purposes of testamentary distribution an *as* may consist of as many ounces as the testator pleases; for instance, if a testator institutes only a single heir, but declares that he is to be heir *ex semisse*, or to one half of the inheritance, this half will really be the whole, for no one can die partly testate and partly intestate, except soldiers, in the carrying out of whose wills the intention is the only thing regarded. Conversely, a testator may divide his inheritance

6 into as large a number of ounces as he pleases. If more heirs than one are instituted, it is unnecessary for the testator to assign a specific share in the inheritance to each, unless he intends that they shall not take in equal portions; for it is obvious that if no shares are specified they divide the inheritance equally between them. Supposing, however, that specific shares are assigned to all the instituted heirs except one, who is left without any express share at all, this last heir will be entitled to any fraction of the *as* which has not been disposed of; and if there are two or more heirs to whom no specific shares have been assigned, they will divide this unassigned fraction equally between them. Finally, if the whole *as* has been assigned in specific shares to some of the heirs, the one or more who have no specific shares take half the inheritance, while the other half is divided among the rest according to the shares assigned to them; and it is immaterial whether the heir who has no specified share comes first or last in the institution, or occupies some intermediate place; for such share is presumed to be given to him as is
7 not in some other way disposed of. Let us now see how the law stands if some part remains undisposed of, and yet each heir has his share assigned to him—if, for instance, there are three heirs instituted, and each is assigned a quarter of the inheritance. It is evident that in this case the part undisposed of will go to them in proportion to the share each has assigned to him by the will, and it will be exactly as if they had each been originally instituted to a third. Conversely, if each heir is given so large a fraction that the *as* will be exceeded, each must suffer a proportionate abatement; thus if four heirs are instituted, and to each is assigned a third of the inheritance, it will be the same as if each had been originally instituted to
8 a quarter. If more than twelve ounces are distributed among some of the heirs only, one being left without a specific share, he will have what is wanting to complete the second *as*; and the same will be done if more than twenty-four ounces are distributed, leaving him shareless; but all these ideal sums are afterwards reduced to the single *as*, whatever be the number of ounces they comprise.

9 The institution of the heir may be either absolute or con-

ditional, but no heir can be instituted from, or up to, some definite date, as, for instance, in the following form—'be so and so my heir after five years from my decease', or 'after the calends of such a month', or 'up to and until such calends'; for a time limitation in a will is considered a superfluity, and an heir instituted subject to such a time limitation is treated as heir absolutely. If the institution of an heir, a legacy, 10
a fiduciary bequest, or a testamentary manumission is made to depend on an impossible condition, the condition is deemed unwritten, and the disposition absolute. If an institution is 11
made to depend on two or more conditions, conjunctively expressed,—as, for instance, 'if this and that shall be done'—all the conditions must be satisfied: if they are expressed in the alternative, or disjunctively—as 'if this or that shall be done'—it is enough if one of them alone is satisfied.

A testator may institute as his heir a person whom he has 12
never seen, for instance, nephews who have been born abroad and are unknown to him: for want of this knowledge does not invalidate the institution.

TITLE XV

OF ORDINARY SUBSTITUTION

A testator may institute his heirs, if he pleases, in two or more degrees, as, for instance, in the following form: 'If A shall not be my heir, then let B be my heir'; and in this way he can make as many substitutions as he likes, naming in the last place one of his own slaves as necessary heir, in default of all others taking. Several may be substituted in place of 1
one, or one in place of several, or to each heir may be substituted a new and distinct person, or, finally, the instituted heirs may be substituted reciprocally in place of one another. If heirs who are instituted in equal shares are reciprocally 2
substituted to one another, and the shares which they are to have in the substitution are not specified, it is presumed (as was settled by a rescript of the Emperor Pius) that the testator intended them to take the same shares in the substitution as they took directly under the will. If a third 3
person is substituted to one heir who himself is substituted to his co-heir, the Emperors Severus and Antoninus have

decided by rescript that this third person is entitled to the
4 shares of both without distinction. If a testator institutes another man's slave, supposing him to be an independent person, and substitutes Maevius in his place to meet the case of his not taking the inheritance, then, if the slave accepts by the order of his master, Maevius is entitled to a half. For, when applied to a person whom the testator knows to be in the power of another, the words 'if he shall not be my heir' are taken to mean 'if he shall neither be heir himself nor cause another to be heir'; but when applied to a person whom the testator supposes to be independent, they mean 'if he shall not acquire the inheritance either for himself, or for that person to whose power he shall subsequently become subject', and this was decided by Tiberius Caesar in the case of his slave Parthenius.

TITLE XVI

OF PUPILLARY SUBSTITUTION

To children below the age of puberty and in the power of the testator, not only can such a substitute as we have described be appointed, that is, one who shall take on their failing to inherit, but also one who shall be their heir if, after inheriting, they die within the age of puberty; and this may be done in the following terms, 'Be my son Titius my heir; and if he does not become my heir, or, after becoming my heir, die before becoming his own master (that is, before reaching puberty), then be Seius my heir.' In which case, if the son fails to inherit, the substitute is the heir of the testator; but if the son, after inheriting, dies within the age of puberty, he is the heir of the son. For it is a rule of customary law, that when our children are too young to make wills for themselves, their parents may make them for them.
1 The reason of this rule has induced us to insert in our Code a constitution, providing that if a testator has children, grandchildren, or great-grandchildren who are lunatics or idiots, he may, after the analogy of pupillary substitution, substitute certain definite persons to them, whatever their sex or the nearness of their relationship to him, and even though they have reached the age of puberty; provided always that on

their recovering their faculties such substitution shall at once become void, exactly as pupillary substitution proper ceases to have any operation after the pupil has reached puberty. Thus, in pupillary substitution effected in the form described, 2
there are, so to speak, two wills, the father's and the son's, just as if the son had personally instituted an heir to himself; or rather, there is one will dealing with two distinct matters, that is, with two distinct inheritances. If a testator be appre- 3
hensive that, after his own death, his son, while still a pupil, may be exposed to the danger of foul play, because another person is openly substituted to him, he ought to make the ordinary substitution openly, and in the earlier part of the testament, and write the other substitution, wherein a man is named heir on the succession and death of the pupil, separately on the lower part of the will; and this lower part he should tie with a separate cord and fasten with a separate seal, and direct in the earlier part of the will that it shall not be opened in the lifetime of the son before he attains the age of puberty. Of course a substitution to a son under the age of puberty is none the less valid because it is an integral part of the very will in which the testator has instituted him his heir, though such an open substitution may expose the pupil to the danger of foul play. Not only when we leave our 4
inheritance to children under the age of puberty can we make such a substitution, that if they accept the inheritance, and then die under that age, the substitute is their heir, but we can do it when we disinherit them, so that whatever the pupil acquires by way of inheritance, legacy or gift from his relatives or friends, will pass to the substitute. What has been said of substitution to children below the age of puberty, whether instituted or disinherited, is true also of substitution to afterborn children. In no case, however, may a man make 5
a will for his children unless he makes one also for himself; for the will of the pupil is but a complementary part of the father's own testament; accordingly, if the latter is void, the former will be void also. Substitution may be made either 6
to each child separately, or only to such one of them as shall last die under the age of puberty. The first is the proper plan, if the testator's intention is that none of them shall die

intestate: the second, if he wishes that, as among them, the order of succession prescribed by the Twelve Tables shall be
7 strictly preserved. The person substituted in the place of a child under the age of puberty may be either named individually—for instance, Titius—or generally described, as by the words 'whoever shall be my heir'; in which latter case, on the child dying under the age of puberty, those are called to the inheritance by the substitution who have been instituted heirs and have accepted, their shares in the substitution being proportionate to the shares in which they succeeded the
8 father. This kind of substitution may be made to males up to the age of fourteen, and to females up to that of twelve years; when this age is once passed, the substitution
9 becomes void. To a stranger, or a child above the age of puberty whom a man has instituted heir, he cannot appoint a substitute to succeed him if he take and die within a certain time: he has only the power to bind him by a trust to convey the inheritance to another either wholly or in part; the law relating to which subject will be explained in its proper place.

TITLE XVII

OF THE MODES IN WHICH WILLS BECOME VOID

A duly executed testament remains valid until either re-
1 voked or rescinded. A will is revoked when, though the civil condition of the testator remains unaltered, the legal force of the will itself is destroyed, as happens when, after making his will, a man adopts as his son either an independent person, in which case the adoption is effected by imperial decree, or a person already in power, when it is done through the agency of the praetor according to our constitution. In both these cases the will is revoked, precisely as it would be by the
2 subsequent birth of a family heir. Again, a subsequent will duly executed is a revocation of a prior will, and it makes no difference whether an heir ever actually takes under it or not; the only question is whether one might conceivably have done so. Accordingly, whether the person instituted declines to be heir, or dies in the lifetime of the testator, or after his death but before accepting the inheritance, or is

excluded by failure of the condition under which he was instituted—in all these cases the testator dies intestate; for the earlier will is revoked by the later one, and the later one is inoperative, as no heir takes under it. If, after duly making 3
one will, a man executes a second one which is equally valid, the Emperors Severus and Antoninus decided by rescript that the first is revoked by the second, even though the heir instituted in the second is instituted to certain things only. The terms of this enactment we have ordered to be inserted here, because it contains another provision. 'The Emperors Severus and Antoninus to Cocceius Campanus. A second will, although the heir named therein be instituted to certain things only, is just as valid as if no mention of the things had been made: but the heir is bound to content himself with the things given him, or with such further portion of the inheritance as will make up the fourth part to which he is entitled under the lex Falcidia, and (subject thereto) to transfer the inheritance to the persons instituted in the earlier will: for the words inserted in the later will undoubtedly contain the expression of a wish that the earlier one shall remain valid.' This accordingly is a mode in which a testa-
ment may be revoked. There is another event by which a 4
will duly executed may be invalidated, namely, the testator's undergoing a loss of status: how this may happen was explained in the preceding Book. In this case the will may be 5
said to be rescinded, though both those that are revoked, and those that are not duly executed, may be said to become or be rescinded; and similarly too those which are duly executed but subsequently rescinded by loss of status may be said to be revoked. However, as it is convenient that different grounds of invalidity should have different names to distinguish them, we say that some wills are unduly executed from the commencement, while others which are duly executed are either revoked or rescinded. Wills, however, which, 6
though duly executed, are subsequently rescinded by the testator's undergoing loss of status are not altogether inoperative: for if the seals of seven witnesses are attached, the instituted heir is entitled to demand possession in accordance with the will, if only the testator were a citizen of Rome

and independent at the time of his decease; but if the cause of the rescission was the testator's subsequent loss of citizenship or of freedom, or his adoption, and he dies an alien, or slave, or subject to his adoptive father's power, the instituted heir is barred from demanding possession in accordance with
7 the will. The mere desire of a testator that a will which he has executed shall no longer have any validity is not, by itself, sufficient to avoid it; so that, even if he begins to make a later will, which he does not complete because he either dies first, or changes his mind, the first will remains good; it being provided in an address of the Emperor Pertinax to the Senate that one testament which is duly executed is not revoked by a later one which is not duly and completely executed; for an incomplete will is undoubtedly null.
8 In the same address the Emperor declared that he would accept no inheritance to which he was made heir on account of a suit between the testator and some third person, nor would he uphold a will in which he was instituted in order to screen some legal defect in its execution, or accept an inheritance to which he was instituted merely by word of mouth, or take any testamentary benefit under a document defective in point of law. And there are numerous rescripts of the Emperors Severus and Antoninus to the same purpose: 'for though,' they say, 'the laws do not bind us, yet we live in obedience to them.'

TITLE XVIII

OF AN UNDUTEOUS WILL

Inasmuch as the disinherison or omission by parents of their children has generally no good reason, those children who complain that they have been wrongfully disinherited or passed over have been allowed to bring an action impeaching the will as unduteous, under the pretext that the testator was of unsound mind at the time of its execution. This does not mean that he was really insane, but that the will, though legally executed, bears no mark of that affection to which a child is entitled from a parent: for if a testator is really
1 insane, his will is void. Parents may impeach the wills of their children as unduteous, as well as children those of their

parents. Brothers and sisters of the testator are by imperial constitutions preferred to infamous persons who are instituted to their exclusion, so that it is in these cases only that they can bring this action. Persons related to the testator in a further degree than as brothers or sisters can in no case bring the action, or at any rate succeed in it when brought. Children fully adopted, in accordance with the distinction 2
drawn in our constitution, can bring this action as well as natural children, but neither can do so unless there is no other mode in which they can obtain the property of the deceased: for those who can obtain the inheritance wholly or in part by any other title are barred from attacking a will as unduteous. Afterborn children too can employ this remedy, if they can by no other means recover the inheritance. That 3
they may bring the action must be understood to mean, that they may bring it only if absolutely nothing has been left them by the testator in his will: a restriction introduced by our constitution out of respect for a father's natural rights. If, however, a part of the inheritance, however small, or even a single thing is left them, the will cannot be impeached, but the heir must, if necessary, make up what is given them to a fourth of what they would have taken had the testator died intestate, even though the will does not direct that this fourth is to be made up by the assessment of an honest and reliable man. If a guardian accepts, under his own father's will, 4
a legacy on behalf of the pupil under his charge, the father having left nothing to him personally, he is in no way debarred from impeaching his father's will as unduteous on his own account. On the other hand, if he impeaches the 5
will of his pupil's father on the pupil's behalf, because nothing has been left to the latter, and is defeated in the action, he does not lose a legacy given in the same will to himself personally. Accordingly, that a person may be barred from 6
the action impeaching the will, it is requisite that he should have a fourth of what he would have taken on intestacy, either as heir, legatee direct or fiduciary, donee in contemplation of death, by gift from the testator in his lifetime (though gift of this latter kind bars the action only if made under any of the circumstances mentioned in our constitution) or in

any of the other modes stated in the imperial legislation.
7 In what we have said of the fourth we must be understood to mean that whether there be one person only, or more than one, who can impeach the will as unduteous, one-fourth of the whole inheritance may be given them, to be divided among them all proportionately, that is to say, to each person a fourth of what he would have had if the testator had died intestate.

TITLE XIX

OF THE KINDS OF AND DIFFERENCES BETWEEN HEIRS

Heirs are of three kinds, that is to say, they are either
1 necessary, family heirs and necessary, or external. A necessary heir is a slave of the testator, whom he institutes as heir: and he is so named because, willing or unwilling, and without any alternative, he becomes free and necessary heir immediately on the testator's decease. For when a man's affairs are embarrassed, it is common for one of his slaves to be instituted in his will, either in the first place, or as a substitute in the second or any later place, so that, if the creditors are not paid in full, the heir may be insolvent rather than the testator, and his property, rather than the testator's, may be sold by the creditors and divided among them. To balance this disadvantage he has this advantage, that his acquisitions after the testator's decease are for his own sole benefit; and although the estate of the deceased is insufficient to pay the creditors in full, the heir's subsequent acquisitions
2 are never on that account liable to a second sale. Heirs who are both family heirs and necessary are such as a son or a daughter, a grandchild by a son, and further similar lineal descendants, provided that they are in the ancestor's power at the time of his decease. To make a grandson or granddaughter a family heir it is, however, not sufficient for them to be in the grandfather's power at the moment of his decease: it is further requisite that their own father shall, in the lifetime of the grandfather, have ceased to be family heir himself, whether by death or by any other mode of release from power: for by this event the grandson and granddaughter succeed to the place of their father. They are

called family heirs, because they are heirs of the house, and even in the lifetime of the parent are to a certain extent deemed owners of the inheritance: wherefore in intestacy the first right of succession belongs to the children. They are called necessary heirs because they have no alternative, but, willing or unwilling, both where there is a will and where there is not, they become heirs. The praetor, however, permits them, if they wish, to abstain from the inheritance, and leave the parent to become insolvent rather than themselves.

3 Those who were not subject to the testator's power are called external heirs. Thus children of ours who are not in our power, if instituted heirs by us, are deemed external heirs; and children instituted by their mother belong to this class, because women never have children in their power. Slaves instituted heirs by their masters, and manumitted subsequently to the execution of the will, belong to the same class.

4 It is necessary that external heirs should have testamentary capacity, whether it is an independent person, or some one in his power, who is instituted: and this capacity is required at two times; at the time of the making of the will, when, without it, the institution would be void; and at the time of the testator's decease, when, without it, the institution would have no effect. Moreover, the instituted heir ought to have this capacity also at the time when he accepts the inheritance, whether he is instituted absolutely or subject to a condition; and indeed it is especially at this time that his capacity to take ought to be looked to. If, however, the instituted heir undergoes a loss of status in the interval between the making of the will and the testator's decease, or the satisfaction of the condition subject to which he was instituted, he is not thereby prejudiced: for, as we said, there are only three points of time which have to be regarded. Testamentary capacity thus does not mean merely capacity to make a will; it also means capacity to take for oneself, or for the father or master in whose power one is, under the will of another person: and this latter kind of testamentary capacity is quite independent of the capacity to make a will oneself. Accordingly, even lunatics, deaf persons, after-born children, infants, children in power, and other persons' slaves are said to have testamentary

capacity; for though they cannot make a valid will, they can acquire for themselves or for another under a will made by
5 some one else. External heirs have the privilege of deliberating whether they will accept or disclaim an inheritance. But if a person who is entitled to disclaim interferes with the inheritance, or if one who has the privilege of deliberation accepts it, he no longer has the power of relinquishing it, unless he is a minor under the age of twenty-five years, for minors obtain relief from the praetor when they incautiously accept a disadvantageous inheritance, as well as when they
6 take any other injudicious step. It is, however, to be observed that the Emperor Hadrian once relieved even a person who had attained his majority, when, after his accepting the inheritance, a great debt, unknown at the time of acceptance, had come to light. This was but the bestowal of an especial favour on a single individual; the Emperor Gordian subsequently extended the privilege, but only to soldiers, to whom it was granted as a class. We, however, in our benevolence have placed this benefit within the reach of all our subjects, and drafted a constitution as just as it is splendid, under which, if heirs will but observe its terms, they can accept an inheritance without being liable to creditors and legatees beyond the value of the property. Thus so far as their liability is concerned there is no need for them to deliberate on acceptance, unless they fail to observe the procedure of our constitution, and prefer deliberation, by which they will remain liable to all the risks of acceptance
7 under the older law. An external heir, whether his right accrue to him under a will or under the civil law of intestate succession, can take the inheritance either by acting as heir, or by the mere intention to accept. By acting as heir is meant, for instance, using things belonging to the inheritance as one's own, or selling them, or cultivating or giving leases of the deceased's estates, provided only one expresses in any way whatsoever, by deed or word, one's intention to accept the inheritance, so long as one knows that the person with whose property one is thus dealing has died testate or intestate, and that one is that person's heir. To act as heir, in fact, is to act as owner, and the ancients often used the

term 'heir' as equivalent to the term 'owner'. And just as the mere intention to accept makes an external heir heir, so too the mere determination not to accept bars him from the inheritance. Nothing prevents a person who is born deaf or dumb, or who becomes so after birth, from acting as heir and thus acquiring the inheritance, provided only he knows what he is doing.

TITLE XX

OF LEGACIES

Let us now examine legacies :—a kind of title which seems foreign to the matter in hand, for we are expounding titles whereby aggregates of rights are acquired ; but as we have treated in full of wills and heirs appointed by will, it was natural in close connexion therewith to consider this mode of acquisition.

Now a legacy is a kind of gift left by a person deceased ; 1
and formerly they were of four kinds, namely, legacy by vin- 2
dication, by condemnation, by permission, and by preception, to each of which a definite form of words was appropriated by which it was known, and which served to distinguish it from legacies of the other kinds. Solemn forms of words of this sort, however, have been altogether abolished by imperial constitutions ; and we, desiring to give greater effect to the wishes of deceased persons, and to interpret their expressions with reference rather to those wishes than to their strict literal meaning, have issued a constitution, composed after great reflection, enacting that in future there shall be but one kind of legacy, and that, whatever be the terms in which the bequest is couched, the legatee may sue for it no less by real or hypothecary than by personal action. How carefully and wisely this constitution is worded may be ascertained by a perusal of its contents. We have determined, however, 3
to go even beyond this enactment ; for, observing that the ancients subjected legacies to strict rules, while the rules which they applied to fiduciary bequests, as springing more directly from the deceased person's wishes, were more liberal, we have deemed it necessary to assimilate the former completely to the latter, so that any features in which legacies are inferior to

fiduciary bequests may be supplied to them from the latter, and the latter themselves may in future possess any superiority which has hitherto been enjoyed by legacies only. In order, however, to avoid perplexing students in their first essays in the law by discussing these two forms of bequest together, we have thought it worth while to treat them separately, dealing first with legacies, and then with fiduciary bequests, so that the reader, having first learnt their respective natures in a separate treatment, may, when his legal education is more advanced, be able easily to comprehend their treatment in combination.

4 A legacy may be given not only of things belonging to the testator or heir, but also of things belonging to a third person, the heir being bound by the will to buy and deliver them to the legatee, or to give him their value if the owner is unwilling to sell them. If the thing given be one of those of which private ownership is impossible, such, for instance, as the Campus Martius, a basilica, a church, or a thing devoted to public use, not even its value can be claimed, for the legacy is void. In saying that a thing belonging to a third person may be given as a legacy we must be understood to mean that this may be done if the deceased knew that it belonged to a third person, and not if he was ignorant of this: for perhaps he would never have given the legacy if he had known that the thing belonged neither to him nor to the heir, and there is a rescript of the Emperor Pius to this effect. It is also the better opinion that the plaintiff, that is the legatee, must prove that the deceased knew he was giving as a legacy a thing which was not his own, rather than that the heir must prove the contradictory: for the general rule of law is that the burden of proof lies on the plaintiff.

5 If the thing which a testator bequeaths is in pledge to a creditor, the heir is obliged to redeem it, subject to the same distinction as has been drawn with reference to a legacy of a thing not belonging to the testator; that is to say, the heir is bound to redeem only if the deceased knew the thing to be in pledge: and the Emperors Severus and Antoninus have decided this by rescript. If, however, the deceased expresses his intention that the legatee should redeem the thing him-

self, the heir is under no obligation to do it for him. If a 6
legacy is given of a thing belonging to another person, and the legatee becomes its owner during the testator's lifetime by purchase, he can obtain its value from the heir by action on the will: but if he gives no consideration for it, that is to say, gets it by way of gift or by some similar title, he cannot sue; for it is settled law that where a man has already got a thing, giving no consideration in return, he cannot get its value by a second title of the same kind. Accordingly, if a man is entitled to claim a thing under each of two distinct wills, it is material whether he gets the thing, or merely its value, under the earlier one: for if he gets the thing itself, he cannot sue under the second will, because he already has the thing without giving any consideration, whereas he has a good right of action if he has merely got its value. A thing 7
which does not yet exist, but will exist, may be validly bequeathed:—for instance, the produce of such and such land, or the child of such and such female slave. If the same 8
thing is given as a legacy to two persons, whether jointly or severally, and both claim it, each is entitled to only a half; if one of them does not claim it, because either he does not care for it, or has died in the testator's lifetime, or for some other reason, the whole goes to his co-legatee. A joint legacy is given in such words as the following: 'I give and bequeath my slave Stichus to Titius and Seius': a several legacy thus, 'I give and bequeath my slave Stichus to Titius: I give and bequeath Stichus to Seius': and even if the testator says 'the same slave Stichus' the legacy is still a several one. If land be bequeathed which belongs to some one other than 9
the testator, and the intended legatee, after purchasing the bare ownership therein, obtains the usufruct without consideration, and then sues under the will, Julian says that this action for the land is well grounded, because in a real action for land a usufruct is regarded merely as a servitude; but it is part of the duty of the judge to deduct the value of the usufruct from the sum which he directs to be paid as the value of the land. A legacy by which something already belong- 10
ing to the legatee is given him is void, for what is his own already cannot become more his own than it is: and even

though he alienates it before the testator's death, neither it nor
11 its value can be claimed. If a testator bequeaths something belonging to him, but which he thought belonged to another person, the legacy is good, for its validity depends not on what he thought, but on the real facts of the case: and it is clearly good if he thought it already belonged to the legatee,
12 because his expressed wish can thus be carried out. If, after making his will, a testator alienates property which he has therein given away as a legacy, Celsus is of opinion that the legatee may still claim it unless the testator's intention was thereby to revoke the bequest, and there is a rescript of the Emperors Severus and Antoninus to this effect, as well as another which decides that if, after making his will, a testator pledges land which he had therein given as a legacy, he is not to be deemed to have thereby revoked the bequest, and that consequently the legatee can enforce by action the heir's obligation to redeem the pledge. And if a testator alienates part of a thing which he has given as a legacy, the part which has not been alienated can in any case be claimed, and the alienated part as well if the alienor's intention was not to
13 revoke the legacy. If a man bequeaths to his debtor a discharge from his debt, the legacy is good, and the testator's heir cannot sue either the debtor himself, or his heir, or any one who occupies the position of heir to him, and the debtor can even compel the testator's heir to formally release him. Moreover, a testator can also forbid his heir to claim payment
14 of a debt before a certain time has elapsed. Contrariwise, if a debtor leaves his creditor a legacy of what he owes him, the legacy is void, if it includes no more than the debt, for the creditor is thus in no way benefited; but if the debtor unconditionally bequeaths a sum of money which the creditor cannot claim until a definite date has arrived or a condition has been satisfied, the legacy is good, because it confers on the creditor a right to earlier payment. And, even if the day arrives, or the condition is satisfied, during the testator's lifetime, Papinian decides, and rightly, that the legacy is nevertheless a good one, because it was good when first written; for the opinion that a legacy becomes void, because something happens to deprive it of all material effect, is now

rejected. If a man leaves his wife a legacy of her dowry, the 15
gift is good, because the legacy is worth more than a mere
right of action for the dowry. If, however, he has never re-
ceived the dowry which he bequeaths, the Emperors Severus
and Antoninus have decided by rescript that the legacy is
void, provided the general term 'dowry' is used, but good, if
in giving it to the wife a definite sum or thing is specified,
or described generally by reference to the dowry deed. If 16
a thing bequeathed perishes through no act of the heir, the
loss falls on the legatee: thus if a slave belonging to another
person, who is given in this way, is manumitted through no
act of the heir, the latter is not bound. If, however, the slave
belongs to the heir, who manumits him, Julian says that he
is bound, and it is immaterial whether he knew or not that
the slave had been bequeathed away from him; and he is
also bound if the slave be manumitted by another person to
whom he has given him, even though he was unaware that he
had been bequeathed away from him. If a testator gives 17
a legacy of female slaves along with their offspring, the
legatee can claim the latter even if the mothers are dead,
and so again if a legacy is given of ordinary slaves along
with their *vicarii* or subordinates, the latter can be claimed
even if the former are dead. But if the legacy be of a slave
along with his peculium, and the slave is dead, or has been
manumitted or alienated, the legacy of the peculium is
extinguished; and similarly, if the legacy be of land with
everything upon it, or with all its instruments of tillage,
by the alienation of the land the legacy of the instruments of
tillage is extinguished. If a flock be given as a legacy, 18
which is subsequently reduced to a single sheep, this single
survivor can be claimed; and Julian says that in a legacy of 19
a flock are comprised sheep which are added to it after the
making of the will, a flock being but one aggregate composed
of distinct members, just as a house is but one aggregate
composed of distinct stones built together. So if the legacy
consist of a house, we hold that pillars or marbles added to it
after the making of the will pass under the bequest. If a 20
slave's peculium be given as a legacy, the legatee undoubtedly
profits by what is added to it, and is a loser by what is taken

from it, during the testator's lifetime. Whatever the slave acquires in the interval between the testator's death and the acceptance of the inheritance belongs, according to Julian, to the legatee, if that legatee be the slave himself who is manumitted by the will, because a legacy of this kind vests from the acceptance of the inheritance: but if the legatee be a stranger, he is not entitled to such acquisitions, unless they are made by means of the peculium itself. A slave manumitted by a will is not entitled to his peculium unless it is expressly bequeathed to him, though, if the master manumits him in his lifetime, it is enough if it be not expressly taken from him, and to this effect the Emperors Severus and Antoninus have decided by rescript: as also, that a legacy of his peculium to a slave does not carry with it the right to sue for money which he has expended on his master's account, and that a legacy of a peculium may be inferred from directions in a will that a slave is to be free so soon as he has made a statement of his accounts and made up any balance,
21 which may be against him, from his peculium. Incorporeal as well as corporeal things can be bequeathed: thus a man can leave a legacy even of a debt which is owed to him, and the heir can be compelled to transfer to the legatee his rights of action, unless the testator has exacted payment in his lifetime, in which case the legacy is extinguished. Again, such a legacy as the following is good: 'be my heir bound to repair
22 so and so's house, or to pay so and so's debts.' If a legacy be a general one, as of a slave or some other thing not specifically determined, the legatee is entitled to choose what slave, or what thing, he will have, unless the testator has expressed
23 a contrary intention. A legacy of selection, that is, when a testator directs the legatee to select one from among his slaves, or any other class of things, was held to be given subject to an implied condition that the legatee should make the choice in person; so that if he died before doing so the legacy did not pass to his heir. By our constitution, however, we have made an improvement in this matter, and allowed the legatee's heir to exercise the right of selection, although the legatee has not done so personally in his lifetime; which enactment, through our careful attention to the subject,

contains the further provision, that if there are either several co-legatees to whom a right of selection has been bequeathed, and who cannot agree in their choice, or several co-heirs of a single legatee, who differ through some wishing to choose this thing and others that, the question shall be decided by fortune—the legacy not being extinguished, which many of the jurists in an ungenerous spirit wished to make the rule—; that is to say, that lots shall be drawn, and he on whom the lot falls shall have a priority of choice over the rest.

Those persons only can be legatees who have testamentary 24
capacity, that is, who are legally capable of taking under a will. Formerly it was not allowed to leave either legacies 25
or fiduciary bequests to uncertain persons, and even soldiers, as the Emperor Hadrian decided by rescript, were unable to benefit uncertain persons in this way. An uncertain person was held to be one of whom the testator had no certain conception, as the legatee in the following form: 'Whoever bestows his daughter in marriage on my son, do thou, my heir, give him such or such land.' So too a legacy left to the first consuls designate after the writing of the will was held to be given to an uncertain person, and many others that might be instanced: and so it was held that freedom could not be bequeathed to an uncertain person, because it was settled that slaves ought to be enfranchised by name, and an uncertain person could not be appointed guardian. But a legacy given with a certain demonstration, that is, to an uncertain member of a certain class, was valid, for instance, the following: 'Whoever of all my kindred now alive shall first marry my daughter, do thou, my heir, give him such or such thing.' It was, however, provided by imperial constitutions that legacies or fiduciary bequests left to uncertain persons and paid by mistake could not be recovered back. An after-born stranger again could not take a legacy; an 26
after-born stranger being one who on his birth will not be a family heir to the testator; thus a grandson by an emancipated son was held to be an after-born stranger to his grandfather. These parts of the law, however, have not been left 27
without due alteration, a constitution having been inserted in our Code by which we have in these respects amended the

rules relating to legacies and fiduciary bequests no less than to inheritances, as will be made clear by a perusal of the enactment, which, however, still maintains the old rule that an uncertain person cannot be appointed guardian: for when a testator is appointing a guardian for his issue, he ought to be quite clear as to the person and character of the party
28 he selects. An after-born stranger could and still can be instituted heir, unless conceived of a woman who cannot by
29 law be a man's wife. If a testator makes a mistake in any of the names of the legatee, the legacy is nevertheless valid provided there is no doubt as to the person he intended, and the same rule is very properly observed as to heirs as well as legatees; for names are used only to distinguish persons, and if the person can be ascertained in other ways a mistake in
30 the name is immaterial. Closely akin to this rule is another, namely, that an erroneous description of the thing bequeathed does not invalidate the bequest; for instance, if a testator says, 'I give and bequeath Stichus my born slave,' the legacy is good, if it is quite clear who is meant by Stichus, even though it turn out that he was not born the testator's slave, but was purchased by him. Similarly, if he describe Stichus as 'the slave I bought from Seius', whereas in fact he bought him from some one else, the legacy is good, if it is clear what
31 slave he intended to give. Still less is a legacy invalidated by a wrong motive being assigned by the testator for giving it: if, for instance, he says, 'I give and bequeath Stichus to Titius, because he looked after my affairs while I was away,' or 'because I was acquitted on a capital charge through his undertaking my defence', the legacy is still good, although in point of fact Titius never did look after the testator's affairs, or never did, through his advocacy, procure his acquittal. But the law is different if the testator expresses his motive in the guise of a condition, as: 'I give and bequeath such and such land to Titius, if he has looked after my affairs.'
32 It is questioned whether a legacy to a slave of the heir is valid. It is clear that such a legacy is void if given unconditionally, even though the slave ceases to belong to the heir during the testator's lifetime: for a legacy which would be void if the testator died immediately after making his will

ought not to become valid by the simple fact of the testator's living longer. Such a legacy, however, is good if given subject to a condition, the question then being, whether at the vesting of the legacy the slave has ceased to belong to the heir. On 33
the other hand, there is no doubt that even an absolute legacy to the master of a slave who is instituted heir is good: for, even supposing that the testator dies immediately after making the will, the right to the legacy does not necessarily belong to the person who is heir ; for the inheritance and the legacy are separable, and a different person from the legatee may become heir through the slave ; as happens if, before the slave accepts the inheritance at his master's bidding, he is conveyed to another person, or is manumitted and thus becomes heir himself; in both of which cases the legacy is valid. But if he remains in the same condition, and accepts at his master's bidding, the legacy is extinguished. A legacy 34
given before an heir was appointed was formerly void, because a will derives its operation from the appointment of an heir, and accordingly such appointment is deemed the beginning and foundation of the whole testament, and for the same reason a slave could not be enfranchised before an heir was appointed. Yet even the old lawyers themselves disapproved of sacrificing the real intentions of the testator by too strictly following the order of the writing: and we accordingly have deemed these rules unreasonable, and amended them by our constitution, which permits a legacy, and much more freedom, which is always more favoured, to be given before the appointment of an heir, or in the middle of the appointments, if there are several. Again, a legacy to take effect after the death 35
of the heir or legatee, as in the form: 'After my heir's death I give and bequeath,' was formerly void, as also was one to take effect on the day preceding the death of the heir or legatee. This too, however, we have corrected, by making such legacies as valid as they would be were they fiduciary bequests, lest in this point the latter should be found to have some superiority over the former. Formerly too the gift, 36
revocation, and transference of legacies by way of penalty was void. A penal legacy is one given in order to coerce the heir into doing or not doing something ; for instance, the

following: 'If my heir gives his daughter in marriage to Titius,' or, conversely, 'if he does not give her in marriage to Titius, let him pay ten *aurei* to Seius'; or again, 'if my heir parts with my slave Stichus,' or, conversely, 'if he does not part with him, let him pay ten *aurei* to Titius'. And so strictly was this rule observed, that it is declared in a large number of imperial constitutions that even the Emperor will accept no legacy by which a penalty is imposed on some other person: and such legacies were void even when given by a soldier's will, in which as a rule so much trouble was taken to carry out exactly the testator's wishes. Moreover, Sabinus was of opinion that a penal appointment of a co-heir was void, as exemplified in the following: 'Be Titius my heir: if Titius gives his daughter in marriage to Seius, be Seius my heir also'; the ground of the invalidity being that it made no difference in what way Titius was constrained, whether by a legacy being left away from him, or by some one being appointed co-heir. Of these refinements, however, we disapproved, and have consequently enacted generally that bequests, even though given, revoked, or transferred in order to penalize the heir, shall be treated exactly like other legacies, except where the event on which the penal legacy is contingent is either impossible, illegal, or immoral: for such testamentary dispositions as these the opinion of my times will not permit.

TITLE XXI

OF THE ADEMPTION AND TRANSFERENCE OF LEGACIES

Legacies may be revoked either in a later clause of the will or by codicils, and the revocation may be made either in words contrary to those of the gift, as the gift thus 'I give and bequeath', the revocation thus 'I do not give and bequeath', or in words not contrary, that is to say, in any words
1 whatsoever. A legacy may also be transferred from one person to another, as thus: 'I give and bequeath to Seius the slave Stichus whom I bequeathed to Titius,' and this may be done either by a later clause of the will or by codicils; the result being that the legacy is taken away from Titius and simultaneously given to Seius.

Title XXII

OF THE LEX FALCIDIA

We have finally to consider the lex Falcidia, the most recent enactment limiting the amount which can be given in legacies. The statute of the Twelve Tables had conferred complete liberty of bequest on testators, by which they were enabled to give away their whole patrimony in legacies, that statute having enacted: 'let a man's testamentary disposition of his property be regarded as valid.' This complete liberty of bequest, however, it was thought proper to limit in the interest of testators themselves, for intestacy was becoming common through the refusal of instituted heirs to accept inheritances from which they received little or no advantage at all. The lex Furia and the lex Voconia were enactments designed to remedy the evil, but as both were found inadequate to the purpose, the lex Falcidia was finally passed, providing that no testator should be allowed to dispose of more than three-quarters of his property in legacies, or in other words, that whether there was a single heir instituted, or two or more, he or they should always be entitled to at least a quarter of the inheritance. If two heirs, say Titius 1
and Seius, are instituted, and Titius's share of the inheritance is either wholly exhausted in legacies specifically charged thereon, or burdened beyond the limit fixed by the statute, while no legacies at all are charged on Seius, or at any rate legacies which exhaust it only to the extent of one half or less, the question arose whether, as Seius has at least a quarter of the whole inheritance, Titius was or was not entitled to retain anything out of the legacies which had been charged upon him: and it was settled that he could keep an entire fourth of his share of the inheritance; for the calculation of the lex Falcidia is to be applied separately to the share of each of several heirs in the inheritance. The amount of the 2
property upon which the calculation is brought to bear is its amount at the moment of the testator's decease. Thus, to illustrate by an example, a testator who is worth a hundred *aurei* at his decease gives the whole hundred away in legacies: here, if before the heir accepts, the inheritance is so much augmented through slaves who belong to it, or by births of

children from such of them as are females, or by the young of cattle, that, even after paying away a hundred *aurei* in legacies, the heir will still have a clear fourth of the inheritance, the legatee's position is in no way improved, but a quarter of the sum given in legacies may still be deducted for himself by the heir. Conversely, if only seventy-five *aurei* are given in legacies, and before acceptance the inheritance is so much diminished in value, say by fire, shipwreck, or death of slaves, that no more or even less than seventy-five *aurei* are left, the legatees can claim payment of their legacies in full. In this latter case, however, the heir is not prejudiced, for he is quite free to refuse the inheritance: consequently, the legatees must come to terms with him, and content themselves with a portion of their legacies, lest they lose all through no one's
3 taking under the will. When the calculation of the lex Falcidia is made, the testator's debts and funeral expenses are first deducted, and the value of slaves whom he has manumitted in the will or directed to be manumitted is not reckoned as part of the inheritance; the residue is then divided so as to leave the heirs a clear fourth, the other three quarters being distributed among the legatees in proportion to the amount of the legacies given them respectively in the will. Thus, if we suppose four hundred *aurei* to have been given in legacies, and the value of the inheritance, out of which they are to be paid, to be exactly that sum, each legatee must have his legacy abated by one-fourth; if three hundred and fifty have been given in legacies, each legacy will be diminished by one-eighth; if five hundred, first a fifth, and then a fourth, must be deducted: for when the amount given in legacies actually exceeds the sum of the inheritance, there must be struck off first the excess, and then the share which the heir is entitled to retain.

TITLE XXIII

OF TRUST INHERITANCES

We now proceed to fiduciary bequests or trusts; and let us begin with trust inheritances.

1 Legacies or inheritances given by trust had originally no binding legal force, because no one could be compelled against

his will to do what he was merely asked to do. As there were certain classes of persons to whom testators were unable to leave inheritances or legacies, when they wished to effect these objects they used to trust to the good faith of some one who had this kind of testamentary capacity, and whom they asked to give the inheritance, or the legacy, to the intended beneficiary; hence the name 'trusts', because they were not enforced by legal obligation, but only by the transferor's sense of honesty. Subsequently the Emperor Augustus, either out of regard for various favourites of his own, or because the request was said to have been made in the name of the Emperor's safety, or moved thereto by individual and glaring cases of perfidy, commanded the consuls in certain cases to enforce the duty by their authority. And this being deemed equitable, and being approved by the people, there was gradually developed a new and permanent jurisdiction, and trusts became so popular that soon a special praetor was appointed to hear suits relating to them, who was called the trust praetor.

2 The first requisite is an heir directly instituted, in trust to transfer the inheritance to another, for the will is void without an instituted heir in the first instance. Accordingly, when a testator has written: 'Lucius Titius, be thou my heir,' he may add: 'I request you, Lucius Titius, as soon as you can accept my inheritance, to convey and transfer it to Gaius Seius'; or he can request him to transfer a part. So a trust may be either absolute or conditional, and to be performed either immediately or on a specified future day.

3 After the transfer of the inheritance the transferor continues heir, the transferee being sometimes regarded as quasi-heir, sometimes as quasi-legatee. But during the reign of Nero, 4 in the consulate of Trebellius Maximus and Annaeus Seneca, a senatusconsult was passed providing that, when an inheritance is transferred in pursuance of a trust, all the actions which the civil law allows to be brought by or against the heir shall be maintainable by and against the transferee: and after this enactment the praetor used to give indirect or fictitious actions to and against the transferee as quasi-heir. However, as the instituted heirs, when (as so often was the 5

case) they were requested to transfer the whole or nearly the whole of an inheritance, declined to accept for what was no benefit, or at most a very slight benefit, to themselves, and this caused a failure of the trusts, afterwards, in the time of the Emperor Vespasian, and during the consulate of Pegasus and Pusio, the senate decreed that an heir who was requested to transfer the inheritance should have the same right to retain a fourth thereof as the lex Falcidia gives to an heir charged with the payment of legacies, and gave a similar right of retaining the fourth of any specific thing left in trust. After the passing of this senatusconsult the heir, wherever it came into operation, was sole administrator, and the transferee of the residue was in the position of a partiary legatee, that is, of a legatee of a certain specified portion of the estate under the kind of bequest called participation, so that the stipulations which had been usual between an heir and a partiary legatee were now entered into by the heir and transferee, in order to secure a rateable division of the gains and losses arising out of the inheritance.
6 Accordingly, after this, if no more than three-fourths of the inheritance was in trust to be transferred, then the SC. Trebellianum governed the transfer, and both were liable to be sued for the debts of the inheritance in rateable portions, the heir by civil law, the transferee, as quasi-heir, by that enactment. But if more than three-fourths, or even the whole was left in trust to be transferred, the SC. Pegasianum came into operation, and when once the heir had accepted, of course voluntarily, he was the sole administrator whether he retained one-fourth or declined to retain it: but if he did, he entered into stipulations with the transferee similar to those usual between the heir and a partiary legatee, while if he did not, but transferred the whole inheritance, he covenanted with him as quasi-purchaser. If an instituted heir refuse to accept an inheritance from a suspicion that the liabilities exceed the assets, it is provided by the SC. Pegasianum that, on the petition of the person to whom he is requested to transfer, he shall be ordered by the praetor to accept and transfer it, whereupon the transferee shall be as capable of suing and being sued as the transferee under the

SC. Trebellianum. In this case no stipulations are necessary, because by a concurrent operation of the two senatusconsults both the transferor is protected, and all actions relating to the inheritance pass to and against the transferee. As, how- 7
ever, the covenants which had become necessary through the SC. Pegasianum were disliked even by the older lawyers, and are in certain cases considered injurious by the eminent jurist Papinian, and it being our desire that our statute book should be clear and simple rather than complicated, we have, after placing these two senatusconsults side by side and examining their points of resemblance and difference, resolved to repeal the SC. Pegasianum, as the later enactment, and to give exclusive authority to the SC. Trebellianum, under which in future all trust inheritances are to be transferred, whether the testator has freely given his heir a fourth of the property, or more or less, or even nothing at all: provided always, that when the heir has either nothing or less than a fourth, it shall be lawful for him, under our authority expressed in this statute, to retain a fourth, or so much as will make his portion equal to a fourth, or to recover it by action if he has already paid it over, the heir and the transferee being capable both of suing and being sued in proportion to their shares in the inheritance, after the analogy of the SC. Trebellianum; and provided also, that if the heir voluntarily transfers the whole inheritance, the transferee shall be able to sue and be sued on all actions relating to the inheritance whatsoever. Moreover, we have transferred to the SC. Trebellianum the leading provision of the SC. Pegasianum, whereby it was enacted that when an instituted heir refused to accept an inheritance offered to him, he could be compelled to accept and transfer the whole inheritance if the intended transferee so desired, and that all actions should pass to and against the latter: so that it is under the SC. Trebellianum alone that the heir, if unwilling to accept, is now obliged to do so, if the intended transferee desire the inheritance, though to him personally no loss or profit can accrue under the transaction. It makes no difference whether it is a sole 8
or part heir who is under a trust to transfer, or whether what he is requested to transfer is the whole or only a part of that

to which he is heir; for we direct that the same rules shall be applied in the case of a part being transferred as we have said are observed in the transference of a whole inheritance.
9 If the request addressed to the heir is to transfer the inheritance after deducting or reserving some specific thing which is equal in value to a fourth part thereof, such as land or anything else, the conveyance will be made under the SC. Trebellianum, exactly as if he had been asked after retaining a fourth part of the inheritance to transfer the residue. There is, however, some difference between the two cases; for in the first, where the inheritance is transferred after deducting or reserving some specific thing, the senatusconsult has the effect of making the transferee the only person who can sue or be sued in respect of the inheritance, and the part retained by the heir is free from all encumbrances, exactly as if he had received it under a legacy; whereas in the second, where the heir, after retaining a fourth part of the inheritance, transfers the rest as requested, the actions are divided, the transferee being able to sue and be sued in respect of three-fourths of the inheritance, and the heir in respect of the rest. Moreover, if the heir is requested to transfer the inheritance after deducting or reserving only a single specific thing, which, however, in value is equivalent to the greater part of the inheritance, the transferee is still the only person who can sue and be sued, so that he ought well to weigh whether it is worth his while to take it: and the case is precisely the same, whether what the heir is directed to deduct or reserve before transferring is two or more specific things, or a definite sum which in fact is equivalent to a fourth or even the greater part of the inheritance. What we have said of a sole heir is equally true of one who is instituted only to a part.
10 Moreover, a man about to die intestate can charge the person to whom he knows his property will go by either the civil or praetorian law to transfer to some one else either his whole inheritance, or a part of it, or some specific thing, such as land, a slave, or money: but legacies have no validity
11 unless given by will. The transferee may himself be charged by the deceased with a trust to transfer to some other person either the whole or a part of what he receives, or even some-

thing different. As has been already observed, trusts in 12
their origin depended solely on the good faith of the heir, from which early history they derived both their name and their character: and it was for that reason that the Emperor Augustus made them legally binding obligations. And we, in our desire to surpass that prince, have recently made a constitution, suggested by a matter brought before us by the eminent Tribonian, quaestor of our sacred palace, by which it is enacted, that if a testator charges his heir with a trust to transfer the whole inheritance or some specific thing, and the trust cannot be proved by writing or by the evidence of five witnesses—five being, as is known, the number required by law for the proof of oral trusts—through there having been fewer witnesses than five, or even none at all, and if the heir, whether it be his own son or some one else whom the testator has chosen to trust, and by whom he desired the transfer to be made, perfidiously refuses to execute the trust, and in fact denies that he was ever charged with it, the alleged beneficiary, having previously sworn to his own good faith, may put the heir upon his oath: whereupon the heir may be compelled to swear that no trust was ever charged upon him, or, in default, to transfer the inheritance or the specific thing, as the case may be, in order that the last wishes of the testator, the fulfilment of which he has left to the honour of his heir, may not be defeated. We have also prescribed the same procedure where the person charged with a trust is a legatee or already himself a transferee under a prior trust. Finally, if the person charged admits the trust, but tries to shelter himself behind legal technicalities, he may most certainly be compelled to perform his obligation.

TITLE XXIV

OF TRUST BEQUESTS OF SINGLE THINGS

Single things can be left in trust as well as inheritances; land, for instance, slaves, clothing, gold, silver, and coined money; and the trust may be imposed either on an heir or on a legatee, although a legatee cannot be charged with a legacy. Not only the testator's property, but that of an 1
heir, or legatee, or person already benefited by a trust, or any

one else may be given by a trust. Thus a legatee, or a person in whose favour the testator has already created a trust, may be asked to transfer either a thing left to him, or any other thing belonging to himself or a stranger, provided always that he is not charged with a trust to transfer more than he takes by the will, for in respect of such excess the trust would be void. When a person is charged by a trust to transfer a thing belonging to some one else, he must either
2 purchase and deliver it, or pay its value. Liberty can be left to a slave by a trust charging an heir, legatee, or other person already benefited by a trust of the testator's, with his manumission, and it makes no difference whether the slave is the property of the testator, of the heir, of the legatee or of a stranger: for a stranger's slave must be purchased and manumitted; and on his master's refusal to sell (which refusal is allowable only if the master has taken nothing under the will) the trust to enfranchise the slave is not extinguished, as though its execution had become impossible, but its execution is merely postponed; because it may become possible to free him at some future time, whenever an opportunity of purchasing him presents itself. A trust of manumission makes the slave the freedman, not of the testator, though he may have been his owner, but of the manumitter, whereas a direct bequest of liberty makes a slave the freedman of the testator, whence too he is called '*orcinus*'. But a direct bequest of liberty can be made only to a slave who belongs to the testator both at the time of making his will and at that of his decease; and by a direct bequest of liberty is to be understood the case where the testator desires him to become free in virtue, as it were, of his own testament alone, and so
3 does not ask some one else to manumit him. The words most commonly used to create a trust are I beg, I request, I wish, I commission, I trust to your good faith; and they are just as binding when used separately as when united.

TITLE XXV

OF CODICILS

It is certain that codicils were not in use before the time of Augustus, for Lucius Lentulus, who was also the originator

of trusts, was the first to introduce them, in the following manner. Being on the point of death in Africa, he executed codicils, confirmed by his will, by which he begged Augustus to do something for him as a trust; and on the Emperor's fulfilling his wishes, other persons followed the precedent and discharged trusts created in this manner, and the daughter of Lentulus paid legacies which could not have been legally claimed from her. It is said that Augustus called a council of certain jurists, among them Trebatius, who at that time enjoyed the highest reputation, and asked them whether the new usage could be sanctioned, or did not rather run counter to the received principles of law, and that Trebatius recommended their admission, remarking 'how convenient and even necessary the practice was to citizens', owing to the length of the journeys which were taken in those early days, and upon which a man might often be able to make codicils when he could not make a will. And subsequently, after codicils had been made by Labeo, nobody doubted their complete validity.

Not only can codicils be made after a will, but a man 1
dying intestate can create trusts by codicils, though Papinian says that codicils executed before a will are invalid unless confirmed by a later express declaration that they shall be binding. But a rescript of the Emperors Severus and Antoninus decides that the performance of a trust imposed by codicils written before a will may in any case be demanded, if it appears that the testator had not abandoned the intention expressed in them. An inheritance can neither be given 2
nor taken away by codicils, nor, accordingly, can a child be disinherited in this way: for, if it were otherwise, the law of wills and of codicils would be confounded. By this it is meant that an inheritance cannot directly be given or taken away by codicils; for indirectly, by means of a trust, one can very well be given in this manner. Nor again can a condition be imposed on an instituted heir, or a direct substitution be effected, by codicils. A man can make any 3
number of codicils, and no solemnities are required for their execution.

BOOK III

TITLE I

OF THE DEVOLUTION OF INHERITANCES ON INTESTACY

A MAN is said to die intestate who either has made no will at all, or has made one which is invalid, or if one which has been duly executed has been subsequently revoked or rescinded, or finally, if no one accepts as heir under the testament.

1 The inheritances of intestate persons go first, by the statute
2 of the Twelve Tables, to family heirs; and family heirs, as we said above, are those who were in the power of the deceased at the time of his death, such as a son or daughter, a grandchild by a son, or a great-grandchild by such grandchild if a male, and this whether the relationship be natural or adoptive. Among them must also be reckoned children who, though not born in lawful wedlock, have been inscribed members of the *curia* according to the tenor of the imperial constitutions relating to them, and thus acquire the rights of family heirs, or who come within the terms of our constitutions by which we have enacted that, if any one shall cohabit with a woman whom he might have lawfully married, but for whom he did not at first feel marital affection, and shall after begetting children by her begin to feel such affection and formally marry her, and then have by her sons or daughters, not only shall those be lawful children and in their father's power who were born after the settlement of the dowry, but also those born before, to whom in reality the later born ones owed their legitimacy; and we have provided that this rule shall hold even though no children are born after the execution of the dowry deed, or if, having been born, they are dead. It is to be observed, however, that a grandchild or great-grandchild is not a family heir, unless the person in the preceding degree has ceased to be in the power of the parent, either through having died, or by some

other means, such as emancipation; for if at the time of a man's decease a son is in his power, a grandson by that son cannot be a family heir, and the case is exactly the same with more remote descendants. Children too who are born after the ancestor's death, and who would have been in his power had they been born during his lifetime, are family heirs. Family heirs succeed even though ignorant of their title, and 3 they can take upon an intestacy even though insane, because whenever the law vests property in a person, even when he is ignorant of his title, it equally vests it in him if insane. Thus, immediately on the parent's death, the ownership is as it were continued without any break, so that pupils who are family heirs do not require their guardian's sanction in order to succeed, for inheritances go to such heirs even though ignorant of their title; and similarly an insane family heir does not require his curator's consent in order to succeed, but takes by operation of law. Sometimes, however, a family heir 4 succeeds in this way to his parent, even though not in the latter's power at the time of his decease, as where a person returns from captivity after his father's death, this being the effect of the law of postliminium. And sometimes conversely 5 a man is not a family heir although in the power of the deceased at the time of his death, as where the latter after his death is adjudged to have been guilty of treason, and his memory is thereby branded with infamy: such a person is unable to have a family heir, for his property is confiscated to the treasury, though one who would otherwise have succeeded him may be said to have in law been a family heir, and ceased to be such. Where there is a son or daughter, and a 6 grandchild by another son, these are called together to the inheritance, nor does the nearer in degree exclude the more remote, for it seems just that grandchildren should represent their father and take his place in the succession. Similarly a grandchild by a son, and a great-grandchild by a grandson are called to the inheritance together. And as it was thought just that grandchildren and great-grandchildren should represent their father, it seemed consistent that the inheritance should be divided by the number of stems, and not by the number of individuals, so that a son should take one-half, and

grandchildren by another son the other: or, if two sons left children, that a single grandchild, or two grandchildren by one son, should take one-half, and three or four grandchildren
7 by the other son the other. In ascertaining whether, in any particular case, so and so is a family heir, one ought to regard only that moment of time at which it first was certain that the deceased died intestate, including hereunder the case of no one's accepting under the will. For instance, if a son be disinherited and a stranger instituted heir, and the son die after the decease of his father, but before it is certain that the heir instituted in the will either will not or cannot take the inheritance, a grandson will take as family heir to his grandfather, because he is the only descendant in existence when first it is certain that the ancestor died intestate; and of this
8 there can be no doubt. A grandson born after, though conceived before, his grandfather's death, whose father dies in the interval between the grandfather's decease and desertion of the latter's will through failure of the instituted heir to take, is family heir to his grandfather; though it is obvious that if (other circumstances remaining the same) he is conceived as well as born after the grandfather's decease, he is no family heir, because he was never connected with his grandfather by any tie of relationship; exactly as a person adopted by an emancipated son is not among the children of, and therefore cannot be family heir to, the latter's father. And such persons, not being children in relation to the inheritance, cannot apply either for possession of the goods of the deceased as next of kin. So much for family heirs.

9 As to emancipated children, they have, by the civil law, no right to succeed to an intestate; for, having ceased to be in the power of their parent, they are not family heirs, nor are they called by any other title in the statute of the Twelve Tables. The praetor, however, following natural equity, gives them possession of the goods of the deceased merely as children, exactly as if they had been in his power at the time of his death, and this whether they stand alone or whether there are family heirs as well. Consequently, if a man die leaving two children, one emancipated, and the other in his power at the time of his decease, the latter is sole heir

by the civil law, as being the only family heir ; but through the former's being admitted to part of the inheritance by the indulgence of the praetor, the family heir becomes heir to part of the inheritance only. Emancipated children, however, 10 who have given themselves in adoption are not thus admitted, under the title of children, to share the property of their natural father, if at the time of his decease they are in their adoptive family ; though it is otherwise if they are emancipated during his lifetime by their adoptive father, for then they are admitted as if they had been emancipated by him and had never been in an adoptive family, while, conversely, as regards their adoptive father, they are henceforth regarded as strangers. If, however, they are emancipated by the adoptive after the death of the natural father, as regards the former they are strangers all the same, and yet do not acquire the rank of children as regards succession to the property of the latter ; the reason of this rule being the injustice of putting it within the power of an adoptive father to determine to whom the property of the natural father shall belong, whether to his children or to his agnates. Adoptive are thus not so well off 11 as natural children in respect of rights of succession : for by the indulgence of the praetor the latter retain their rank as children even after emancipation, although they lose it by the civil law ; while the former, if emancipated, are not assisted even by the praetor. And there is nothing wrong in their being thus differently treated, because civil changes can affect rights annexed to a civil title, but not rights annexed to a natural title, and natural descendants, though on emancipation they cease to be family heirs, cannot cease to be children or grandchildren ; whereas on the other hand adoptive children are regarded as strangers after emancipation, because they lose the title and name of son or daughter, which they have acquired by a civil change, namely adoption, by another civil change, namely emancipation. And the rule is the same 12 in the possession of goods against the will which the praetor promises to children who are passed over in their parent's testament, that is to say, are neither instituted nor duly disinherited ; for the praetor calls to this possession children who were in their parent's power at the time of his decease,

or emancipated, but excludes those who at that time were in an adoptive family: still less does he here admit adoptive children emancipated by their adoptive father, for by emanci-
13 pation they cease entirely to be children of his. We should observe, however, that though children who are in an adoptive family, or who are emancipated by their adoptive after the decease of their natural father, are not admitted on the death of the latter intestate by that part of the edict by which children are called to the possession of goods, they are called by another part, namely that which admits the cognates of the deceased, who, however, come in only if there are no family heirs, emancipated children, or agnates to take before them: for the praetor prefers children, whether family heirs or emancipated, to all other claimants, ranking in the second degree statutory successors, and in the third cognates, or next
14 of kin. All these rules, however, which to our predecessors were sufficient, have received some emendation by the constitution which we have enacted relative to persons who have been given in adoption to others by their natural fathers; for we found cases in which sons by entering an adoptive family forfeited their right of succeeding their natural parents, and then, the tie of adoption being easily broken by emancipation, lost all title to succeed their adoptive parents as well. We have corrected this, in our usual manner, by a constitution which enacts that, when a natural father gives his son in adoption to another person, the son's rights shall remain the same in every particular as if he had continued in the power of his natural father, and the adoption had never taken place, except only that he shall be able to succeed his adoptive father should he die intestate. If, however, the latter makes a will, the son cannot obtain any part of the inheritance either by the civil or by the praetorian law, that is to say, either by impeaching the will as unduteous or by applying for possession against the will; for, being related by no tie of blood, the adoptive father is not bound either to institute him heir or to disinherit him, even though he has been adopted, in accordance with the SC. Afinianum, from among three brothers; for, even under these circumstances, he is not entitled to a fourth of what he might have taken on intestacy,

nor has he any action for its recovery. We have, however, by our constitution excepted persons adopted by natural ascendants, for between them and their adopters there is the natural tie of blood as well as the civil tie of adoption, and therefore in this case we have preserved the older law, as also in that of an independent person giving himself in adrogation: all of which enactment can be gathered in its special details from the tenor of the aforesaid constitution.

By the ancient law too, which favoured the descent through 15
males, those grandchildren only were called as family heirs, and preferred to agnates, who were related to the grandfather in this way: grandchildren by daughters, and great-grandchildren by granddaughters, whom it regarded only as cognates, being called after the agnates in the succession to their maternal grandfather or great-grandfather, or their grandmother or great-grandmother, whether paternal or maternal. But the Emperors would not allow so unnatural a wrong to endure without sufficient correction, and accordingly, as people are, and are called, grandchildren and great-grandchildren of a person whether they trace their descent through males or through females, they placed them altogether in the same rank and order of succession. In order, however, to bestow some privilege on those who had in their favour the provisions of the ancient law as well as natural right, they determined that grandchildren, great-grandchildren, and others who traced their descent through a female should have their portion of the inheritance diminished by receiving less by one-third than their mother or grandmother would have taken, or than their father or grandfather, paternal or maternal, when the deceased, whose inheritance was in question, was a woman; and they excluded the agnates, if such descendants claimed the inheritance, even though they stood alone. Thus, exactly as the statute of the Twelve Tables calls the grandchildren and great-grandchildren to represent their deceased father in the succession to their grandfather, so the imperial legislation substitutes them for their deceased mother or grandmother, subject to the aforesaid deduction of a third part of the share which she personally would have taken. As, however, there 16
was still some question as to the relative rights of such

grandchildren and of the agnates, who on the authority of a certain constitution claimed a fourth part of the deceased's estate, we have repealed the said enactment, and not permitted its insertion in our Code from that of Theodosius. By the constitution which we have published, and by which we have altogether deprived it of validity, we have provided that in case of the survival of grandchildren by a daughter, great-grandchildren by a granddaughter, or more remote descendants related through a female, the agnates shall have no claim to any part of the estate of the deceased, that collaterals may no longer be preferred to lineal descendants; which constitution we hereby re-enact with all its force from the date originally determined: provided always, as we direct, that the inheritance shall be divided between sons and grandchildren by a daughter, or between all the grandchildren, and other more remote descendants, according to stocks, and not by counting heads, on the principle observed by the ancient law in dividing an inheritance between sons and grandchildren by a son, the issue obtaining without any diminution the portion which would have belonged to their mother or father, grandmother or grandfather: so that if, for instance, there be one or two children by one stock, and three or four by another, the one or two, and the three or four, shall together take respectively one moiety of the inheritance.

TITLE II

OF THE STATUTORY SUCCESSION OF AGNATES

If there is no family heir, nor any of those persons called to the succession along with family heirs by the praetor or the imperial legislation, to take the inheritance in any way, it devolves, by the statute of the Twelve Tables, on the
1 nearest agnate. Agnates, as we have observed in the first book, are those cognates who trace their relationship through males, or, in other words, who are cognate through their respective fathers. Thus, brothers by the same father are agnates, whether by the same mother or not, and are called *consanguinei*; an uncle is agnate to his brother's son, and vice versa; and the children of brothers by the same father, who are called *consobrini*, are one another's agnates, so that it is

easy to arrive at various degrees of agnation. Children who are born after their father's decease acquire the rights of kinship exactly as if they had been born before that event. But the law does not give the inheritance to all the agnates, but only to those who were nearest in degree at the moment when it first was certain that the deceased died intestate. The relation of agnation can also be established 2
by adoption, for instance, between a man's own sons and those whom he has adopted, all of whom are properly called *consanguinei* in relation to one another. So too, if your brother, or your paternal uncle, or even a more remote agnate, adopts any one, that person undoubtedly becomes one of your agnates. Male agnates have reciprocal rights of suc- 3
cession, however remote the degree of relationship: but the rule as regards females, on the other hand, was that they could not succeed as agnates to any one more remotely related to them than a brother, while they themselves could be succeeded by their male agnates, however distant the connexion: thus you, if a male, could take the inheritance of a daughter either of your brother or of your paternal uncle, or of your paternal aunt, but she could not take yours; the reason of this distinction being the seeming expediency of successions devolving as much as possible on males. But as it was most unjust that such females should be as completely excluded as if they were strangers, the praetor admits them to the possession of goods promised in that part of the edict in which mere natural kinship is recognized as a title to succession, under which they take provided there is no agnate, or other cognate of a nearer degree of relationship. Now these distinctions were in no way due to the statute of the Twelve Tables, which, with the simplicity proper to all legislation, conferred reciprocal rights of succession on all agnates alike, whether males or females, and excluded no degree by reason merely of its remoteness, after the analogy of family heirs; but it was introduced by the jurists who came between the Twelve Tables and the imperial legislation, and who with their legal subtleties and refinements excluded females other than sisters altogether from agnatic succession. And no other scheme of succession was in those times heard

of, until the praetors, by gradually mitigating to the best of their ability the harshness of the civil law, or by filling up voids in the old system, provided through their edicts a new one. Mere cognation was thus in its various degrees recognized as a title to succession, and the praetors gave relief to such females through the possession of goods, which they promised to them in that part of the edict by which cognates are called to the succession. We, however, have followed the Twelve Tables in this department of law, and adhered to their principles: and, while we commend the praetors for their sense of equity, we cannot hold that their remedy was adequate; for when the degree of natural relationship was the same, and when the civil title of agnation was conferred by the older law on males and females alike, why should males be allowed to succeed all their agnates, and women (except sisters) be debarred from succeeding any? Accordingly, we have restored the old rules in their integrity, and made the law on this subject an exact copy of the Twelve Tables, by enacting, in our constitution, that all 'statutory' successors, that is, persons tracing their descent from the deceased through males, shall be called alike to the succession as agnates on an intestacy, whether they be males or females, according to their proximity of degree; and that no females shall be excluded on the pretence that none but sisters have the right of succeeding by
4 the title of kinship. By an addition to the same enactment we have deemed it right to transfer one, though only one, degree of cognates into the ranks of those who succeed by a statutory title, in order that not only the children of a brother may be called, as we have just explained, to the succession of their paternal uncle, but that the children of a sister too, even though only of the half blood on either side (but not her more remote descendants), may share with the former the inheritance of their uncle; so that, on the decease of a man who is paternal uncle to his brother's children, and maternal uncle to those of his sister, the nephews and nieces on either side will now succeed him alike, provided, of course, that the brother and sister do not survive, exactly as if they all traced their relationship through males, and thus all had a statutory title. But if the deceased leaves brothers or sisters who accept the inherit-

ance, the remoter degrees are altogether excluded, the division in this case being made individually, that is to say, by counting heads, not stocks. If there are several degrees of agnates, 5
the statute of the Twelve Tables clearly calls only the nearest, so that if, for instance, the deceased leaves a brother, and a nephew by another brother deceased, or a paternal uncle, the brother is preferred. And although that statute, in speaking of the nearest agnate, uses the singular number, there is no doubt that if there are several of the same degree they are all admitted: for though properly one can speak of 'the nearest degree' only when there are several, yet it is certain that even though all the agnates are in the same degree the inheritance belongs to them. If a man dies without having made a will 6
at all, the agnate who takes is the one who was nearest at the time of the death of the deceased. But when a man dies, having made a will, the agnate who takes (if one is to take at all) is the one who is nearest when first it becomes certain that no one will accept the inheritance under the testament; for until that moment the deceased cannot properly be said to have died intestate at all, and this period of uncertainty is sometimes a long one, so that it not unfrequently happens that through the death, during it, of a nearer agnate, another becomes nearest who was not so at the death of the testator. In agnatic succession the established rule was that the right 7
of accepting the inheritance could not pass from a nearer to a more remote degree; in other words, that if the nearest agnate, who, as we have described, is called to the inheritance, either refuses it or dies before acceptance, the agnates of the next grade have no claim to admittance under the Twelve Tables. This hard rule again the praetors did not leave entirely without correction, though their remedy, which consisted in the admission of such persons, since they were excluded from the rights of agnation, in the rank of cognates, was inadequate. But we, in our desire to have the law as complete as possible, have enacted in the constitution which in our clemency we have issued respecting the rights of patrons, that in agnatic succession the transference of the right to accept from a nearer to a remoter degree shall not be refused: for it was most absurd that agnates should be denied

a privilege which the praetor had conferred on cognates especially as the burden of guardianship fell on the second degree of agnates if there was a failure of the first, the principle which we have now sanctioned being admitted so far as it imposed burdens, but rejected so far as it conferred a boon.

8 To statutory succession the ascendant too is none the less called who emancipates a child, grandchild, or remoter descendant under a fiduciary agreement, which by our constitution is now implied in every emancipation. Among the ancients the rule was different, for the parent acquired no rights of succession unless he had entered into a special agreement of trust to that effect prior to the emancipation.

TITLE III

OF THE SENATUSCONSULTUM TERTULLIANUM

So strict were the rules of the statute of the Twelve Tables in preferring the issue of males, and excluding those who traced their relationship through females, that they did not confer reciprocal rights of inheritance even on a mother and her children, though the praetors called them to succeed one another as next of kin by promising them the possession

1 of goods in the class of cognates. But this narrowness of the law was afterwards amended, the Emperor Claudius being the first to confer on a mother, as a consolation for the loss

2 of her children, a statutory right to their inheritance, and afterwards, very full provisions were made by the SC. Tertullianum, enacted in the time of the Emperor Hadrian, and relating to the melancholy succession of children by their mothers, though not by their grandmothers, whereby it was provided that a freeborn woman who had three or a freedwoman who had four children should be entitled to succeed to the goods of her children who died intestate, even though herself under paternal power; though, in this latter case, she cannot accept the inheritance except by the direction of the

3 person in whose power she is. Children of the deceased who are or who rank as family heirs, whether in the first or any other degree, are preferred to the mother, and even where the deceased is a woman her children by imperial constitutions have a prior claim to the mother, that is, to their own

grandmother. Again, the father of the deceased is preferred to the mother, but not so the paternal grandfather or great-grandfather, at least when it is between them only that the question arises who is entitled. A brother by the same father excluded the mother from the succession to both sons and daughters, but a sister by the same father came in equally with the mother; and where there were both a brother and a sister by the same father, as well as a mother who was entitled by number of children, the brother excluded the mother, and divided the inheritance in equal moieties with the sister. By a constitution, however, which we have placed 4
in the Code made illustrious by our name, we have deemed it right to afford relief to the mother, in consideration of natural justice, of the pains of childbirth, and of the danger and even death which mothers often incur in this manner; for which reason we have judged it a sin that they should be prejudiced by a circumstance which is entirely fortuitous. For if a free-born woman had not borne three, or a freedwoman four children, she was undeservedly defrauded of the succession to her own offspring; and yet what fault had she committed in bearing few rather than many children? Accordingly, we have conferred on mothers a full statutory right of succession to their children, whether they be freeborn or freedwomen, although they may not have given birth to three or four children, and even if they have had no other child than the one in question deceased. The earlier constitutions, in their 5
review of statutory rights of succession, were in some points favourable, in others unfavourable, to mothers; thus in some cases they did not call them to the whole inheritance of their children, but deducted a third in favour of certain other persons with a statutory title, while in others they did exactly the opposite. We, however, have determined to follow a straightforward and simple path, and, preferring the mother to all other persons with a statutory title, to give her the entire succession of her sons, without deduction in favour of any other persons except a brother or sister, whether by the same father as the deceased, or possessing rights of cognation only; so that, as we have preferred the mother to all with a statutory title, so we call to the inheritance, along with her, all

brothers and sisters of the deceased, whether statutorily entitled or not: provided that, if the only surviving relatives of the deceased are sisters, agnatic or cognatic, and a mother, the latter shall have one-half, and all the sisters together the other half of the inheritance; if a mother and a brother or brothers, with or without sisters agnatic or cognatic, the inheritance shall be divided among mother, brothers, and sisters
6 in equal portions. But, while we are legislating for mothers, we ought also to bestow some thought on their offspring; and accordingly mothers should observe that if they do not apply within a year for guardians for their children, either originally or in lieu of those who have been removed or excused, they will forfeit their title to succeed such children if they die under
7 the age of puberty. A mother can succeed her child under the SC. Tertullianum even though the child be illegitimate.

TITLE IV

OF THE SENATUSCONSULTUM ORFITIANUM

Conversely, children were admitted to succeed their mother on her death intestate by the SC. Orfitianum, passed in the time of the Emperor Marcus, when Orfitus and Rufus were consuls: by which a statutory right of succession was conferred on both sons and daughters, even though in the power of another, in preference to their deceased mother's brothers
1 and sisters and other agnates. As, however, grandsons were not called by this senatusconsult with a statutory title to the succession of their grandmothers, this was subsequently amended by imperial constitutions, providing that grand-
2 children should be called to inherit exactly like children. It is to be observed that rights of succession such as those conferred by the SC^a. Tertullianum and Orfitianum are not extinguished by loss of status, owing to the rule that rights of succession conferred by later statutes are not destroyed in this way, but only such as are conferred by the statute of the
3 Twelve Tables; and finally that under the latter of these two enactments even illegitimate children are admitted to their mother's inheritance.

4 If there are several heirs with a statutory title, some of whom do not accept, or are prevented from doing so by death

or some other cause, their shares accrue in equal proportions to those who do accept the inheritance, or to their heirs, supposing they die before the failure of the others to take.

TITLE V

OF THE SUCCESSION OF COGNATES

After family heirs, and persons who by the praetor and the imperial legislation are ranked as such, and after persons statutorily entitled, among whom are the agnates and those whom the aforesaid senatusconsults and our constitution have raised to the rank of agnates, the praetor calls the nearest cognates. In this class or order natural or blood relationship 1
alone is considered: for agnates who have undergone loss of status and their children, though not regarded as having a statutory title under the statute of the Twelve Tables, are called by the praetor in the third order of succession. The sole exceptions to this rule are emancipated brothers and sisters (not, however, including their children), who are admitted by the statute of Anastasius to the statutory succession of a brother or sister along with other brothers and sisters, though not in equal shares with them, but with some deduction, the amount of which can easily be ascertained from the terms of the constitution itself. But to other agnates of remoter degrees, even though they have not undergone loss of status, and still more to cognates, they are preferred by the aforesaid statute. Again, 2
collateral relations connected with the deceased only by the female line are called to the succession by the praetor in the third order as cognates; and children who are in an adoptive 3
family are admitted in this order to the inheritance of their natural parent. It is clear that illegitimate children can have 4
no agnates, for in law they have no father, and it is through the father that agnatic relationship is traced, while cognatic relationship is traced through the mother as well. On the same principle they cannot be held to be *consanguinei* of one another, for *consanguinei* are in a way agnatically related: consequently, they are connected with one another only as cognates, and in the same way too with the cognates of their mother. Accordingly, they can succeed to the possession of goods under that part of the Edict in which cognates are

5 called by the title of mere kinship. In this place too we should observe that a person who claims as an agnate can be admitted to the inheritance, even though ten degrees removed from the deceased, both by the statute of the Twelve Tables, and by the Edict in which the praetor promises the possession of goods to heirs statutorily entitled: but on the ground of mere natural kinship the praetor promises possession of goods to those cognates only who are within the sixth degree; the only persons in the seventh degree whom he admits as cognates being the children of a second cousin of the deceased.

TITLE VI

OF THE DEGREES OF COGNATION

It is here necessary to explain the way in which the degrees of natural relationship are reckoned. In the first place it is to be observed that they can be counted either upwards, or downwards, or crosswise, that is to say, collaterally. Relations in the ascending line are parents, in the descending line, children: collateral relations are brothers and sisters, their children, and similarly uncles and aunts paternal and maternal. In the ascending and descending lines a man's nearest cognate may be related to him in the first degree; in the collateral line he cannot be nearer to him than the second.

1 Relations in the first degree, reckoning upwards, are the father and mother; reckoning downwards, the son and
2 daughter. Those in the second degree, upwards, are grandfather and grandmother; downwards, grandson and grand-
3 daughter; and in the collateral line brother and sister. In the third degree, upwards, are the great-grandfather and great-grandmother; downwards, the great-grandson and great-granddaughter; in the collateral line, the sons and daughters of a brother or sister, and also uncles and aunts paternal and maternal. The father's brother is called *patruus*, in Greek πατρῷος, the mother's brother *avunculus*, in Greek specifically μητρῷος, though the term θεῖος is used indifferently to indicate either. The father's sister is called *amita*, the mother's *matertera*; both go in Greek by the name θεία, or, with some,
4 τιτθίς. In the fourth degree, upwards, are the great-great-

grandfather and the great-great-grandmother; downwards, the great-great-grandson and the great-great-granddaughter; in the collateral line, the paternal great-uncle and great-aunt, that is to say, the grandfather's brother and sister: the same relations on the grandmother's side, that is to say, her brother and sister: and first cousins male and female, that is, children of brothers and sisters in relation to one another. The children of two sisters, in relation to one another, are properly called *consobrini*, a corruption of *consororini*; those of two brothers, in relation to one another, *fratres patrueles*, if males, *sorores patrueles*, if females; and those of a brother and a sister, in relation to one another, *amitini*; thus the sons of your father's sister call you *consobrinus*, and you them *amitini*.
In the fifth degree, upwards, are the grandfather's great- 5
grandfather and great-grandmother, downwards, the great-grandchildren of one's own grandchildren, and in the collateral line the grandchildren of a brother or sister, a great-grandfather's or great-grandmother's brother or sister, the children of one's first cousins, that is, of a *frater* or *soror patruelis*, of a *consobrinus* or *consobrina*, of an *amitinus* or *amitina*, and first cousins once removed, that is to say, the children of a great-uncle or great-aunt paternal or maternal.
In the sixth degree, upwards, are the great-grandfather's 6
great-grandfather and great-grandmother; downwards, the great-grandchildren of a great-grandchild, and in the collateral line the great-grandchildren of a brother or sister, as also the brother and sister of a great-great-grandfather or great-great-grandmother, and second cousins, that is to say, the children of *fratres* or *sorores patrueles*, of *consobrini*, or of *amitini*. This will be enough to show how the degrees of 7
relationship are reckoned; for from what has been said it is easy to understand how we ought to calculate the remoter degrees also, each generation always adding one degree: so that it is far easier to say in what degree any one is related to some one else than to indicate his relationship by the proper specific term. The degrees of agnation are also reckoned in 8
the same manner; but as truth is fixed in the mind of man 9
much better by the eye than by the ear, we have deemed it necessary, after giving an account of the degrees of relation-

ship, to have a table of them inserted in the present book, that so the youth may be able by both ears and eyes to gain a most perfect knowledge of them.

10 It is certain that the part of the Edict in which the possession of goods is promised to the next of kin has nothing to do with the relationships of slaves with one another, nor is there any old statute by which such relationships were recognized. However, in the constitution which we have issued with regard to the rights of patrons—a subject which up to our times had been most obscure, and full of difficulties and confusion—we have been prompted by humanity to grant that if a slave shall beget children by either a free woman or another slave, or conversely if a slave woman shall bear children of either sex by either a freeman or a slave, and both the parents and the children (if born of a slave woman) shall become free, or if the mother being free, the father be a slave, and subsequently acquire his freedom, the children shall in all these cases succeed their father and mother, and the patron's rights lie dormant. And such children we have called to the succession not only of their parents, but also of one another reciprocally, by this enactment, whether those born in slavery and subsequently manumitted are the only children, or whether there be others conceived after their parents had obtained their freedom, and whether they all have the same father or mother, or the same father and different mothers, or vice versa ; the rules applying to children born in lawful wedlock being applied here also.

11 To sum up all that we have said, it appears that persons related in the same degree of cognation to the deceased are not always called together, and that even a remoter is sometimes preferred to a nearer cognate. For as family heirs and those whom we have enumerated as equivalent to family heirs have a priority over all other claimants, it is clear that a great-grandson or great-great-grandson is preferred to a brother, or the father or mother of the deceased; and yet the father and mother, as we have remarked above, are in the first degree of cognation, and the brother is in the second, while the great-grandson and great-great-grandson are only in the third and fourth respectively. And it is immaterial

whether the descendant who ranks among family heirs was in the power of the deceased at the time of his death, or out of it through having been emancipated or through being the child of an emancipated child or of a child of the female sex. When there are no family heirs, and none of those persons 12
who we have said rank as such, an agnate who has lost none of his agnatic rights, even though very many degrees removed from the deceased, is usually preferred to a nearer cognate; for instance, the grandson or great-grandson of a paternal uncle has a better title than a maternal uncle or aunt. Accordingly, in saying that the nearest cognate is preferred in the succession, or that, if there are several cognates in the nearest degree, they are called equally, we mean that this is the case if no one is entitled to priority, according to what we have said, as either being or ranking as a family heir, or as being an agnate; the only exceptions to this being emancipated brothers and sisters of the deceased who are called to succeed him, and who, in spite of their loss of status, are preferred to other agnates in a remoter degree than themselves.

TITLE VII

OF THE SUCCESSION TO FREEDMEN

Let us now turn to the property of freedmen. These were originally allowed to pass over their patrons in their wills with impunity: for by the statute of the Twelve Tables the inheritance of a freedman devolved on his patron only when he died intestate without leaving a family heir. If he died intestate, but left a family heir, the patron was not entitled to any portion of this property, and this, if the family heir was a natural child, seemed to be no grievance; but if he was an adoptive child, it was clearly unfair that the patron should be debarred from all right to the succession. Accordingly 1
this injustice of the law was at a later period corrected by the praetor's Edict, by which, if a freedman made a will, he was commanded to leave his patron half his property; and, if he left him nothing at all, or less than a half, possession of such half was given to him against the testament. If, on the other hand, he died intestate, leaving as family heir

an adoptive son, the patron could obtain even against the latter possession of the goods of the deceased to the extent of one-half. But the freedman was enabled to exclude the patron if he left natural children, whether in his power at the time of his death, or emancipated or given in adoption, provided that he made a will in which he instituted them heirs to any part of the succession, or that, being passed over, they demanded possession against the will under the Edict:
2 if disinherited, they did not avail to bar the patron. At a still later period the lex Papia Poppaea augmented the rights of patrons who had more wealthy freedmen. By this it was enacted that, whenever a freedman left property amounting in value to a hundred thousand sesterces and upwards, and not so many as three children, the patron, whether he died testate or intestate, should be entitled to a portion equal to that of a single child. Accordingly, if the freedman left a single son or daughter as heir, the patron could claim half the property, exactly as if he had died without leaving any children: if he left two children as heirs, the patron could claim a third: if he left three, the patron was excluded altogether.
3 In our constitution, however, which we have drawn up in a convenient form and in the Greek language, so as to be known by all, we have established the following rules for application to such cases. If the freedman or freedwoman is less than a *centenarius*, that is, has a fortune of less than a hundred *aurei* (which we have reckoned as equivalent to the sum of a hundred thousand sesterces fixed by the lex Papia), the patron shall have no right to any share in the succession if they make a will; while, if they die intestate without leaving any children, we have retained unimpaired the rights conferred on the patron by the Twelve Tables. If they are possessed of more than a hundred *aurei*, and leave a descendant or descendants of either sex and any degree to take the inheritance civil or praetorian, we have given to such child or children the succession to their parents, to the exclusion of every patron and his issue. If, however, they leave no children, and die intestate, we have called the patron or patroness to their whole inheritance: while if they make a will, passing over their patron or patroness, and leaving no

children, or having disinherited such as they have, or (supposing them to be mothers or maternal grandfathers) having passed them over without leaving them the right to impeach the testament as unduteous, then, under our constitution, the patron shall succeed, by possession against the will, not, as before, to one-half of the freedman's estate, but to one-third, or, if the freedman or freedwoman has left him less than this third in his or her will, to so much as will make up the difference. But this third shall be free from all charges, even from legacies or trust bequests in favour of the children of the freedman or freedwoman, all of which are to fall on the patron's co-heirs. In the same constitution we have gathered together the rules applying to many other cases, which we deemed necessary for the complete settlement of this branch of law: for instance, a title to the succession of freedmen is conferred not only on patrons and patronesses, but on their children and collateral relatives to the fifth degree: all of which may be ascertained by reference to the constitution itself. If, however, there are several descendants of a patron or patroness, or of two or several, the nearest in degree is to take the succession of the freedman or freedwoman, which is to be divided, not among the stocks, but by counting the heads of those nearest in degree. And the same rule is to be observed with collaterals: for we have made the law of succession to freedmen almost identical with that relating to freeborn persons. All that has been 4
said relates nowadays to freedmen who are Roman citizens, for *dediticii* and *Latini Iuniani* having been together abolished there are now no others. As to a statutory right of succession to a Latin, there never was any such thing; for men of this class, though during life they lived as free, yet as they drew their last breath they lost their liberty along with their life, and under the lex Iunia their manumitters kept their property, like that of slaves, as a kind of peculium. It was subsequently provided by the SC. Largianum that the manumitter's children, unless expressly disinherited, should be preferred to his external heirs in succession to the goods of a Latin; and this was followed by the edict of the Emperor Trajan, providing that a Latin who contrived, without the knowledge or consent of his patron, to obtain by imperial

favour a grant of citizenship should live a citizen, but die a Latin. Owing, however, to the difficulties accompanying these changes of condition, and others as well, we have determined by our constitution to repeal for ever the lex Iunia, the SC. Largianum, and the edict of Trajan, and to abolish them along with the Latins themselves, so as to enable all freedmen to enjoy the citizenship of Rome: and we have converted in a wonderful manner the modes in which persons became Latins, with some additions, into modes of attaining Roman citizenship.

TITLE VIII

OF THE ASSIGNMENT OF FREEDMEN

Before we leave the subject of succession to freedmen, we should observe a resolution of the Senate, to the effect that, though the property of freedmen belongs in equal portions to all the patron's children who are in the same degree, it shall yet be lawful for a parent to assign a freedman to one of his children, so that after his own death the assignee shall be considered his sole patron, and the other children who, had it not been for such assignment, would be admitted equally with him, shall have no claim to the succession whatever: though they recover their original rights if the assignee
1 dies without issue. It is lawful to assign freedwomen as well as freedmen, and to daughters and granddaughters no
2 less than to sons and grandsons; and the power of assignment is conferred on all who have two or more children in their power, and enables them to assign a freedman or freedwoman to such children while so subject to them. Accordingly the question arose, whether the assignment becomes void, if the parent subsequently emancipates the assignee? and the affirmative opinion, which was held by Julian and
3 many others, has now become settled law. It is immaterial whether the assignment is made in a testament or not, and indeed patrons are enabled to exercise this power in any terms whatsoever, as is provided by the senatusconsult passed in the time of Claudius, when Suillus Rufus and Ostorius Scapula were consuls.

Title IX

OF POSSESSION OF GOODS

The law as to the possession of goods was introduced by the praetor by way of amending the older system, and this not only in intestate succession, as has been described, but also in cases where deceased persons have made a will. For instance, although the posthumous child of a stranger, if instituted heir, could not by the civil law enter upon the inheritance, because his institution would be invalid, he could with the assistance of the praetor be made possessor of the goods by the praetorian law. Such a one can now, however, by our constitution be lawfully instituted, as being no longer unrecognized by the civil law. Sometimes, however, the 1
praetor promises the possession of goods rather in confirmation of the older law than for the purpose of correcting or impugning it; as, for instance, when he gives possession in accordance with a duly executed will to those who have been instituted heirs therein. Again, he calls family heirs and agnates to the possession of goods on an intestacy; and yet, even putting aside the possession of goods, the inheritance belongs to them already by the civil law. Those whom the 2
praetor calls to a succession do not become heirs in the eye of law, for the praetor cannot make an heir, because persons become heirs by a statute only, or some similar ordinance such as a senatusconsult or an imperial constitution: but as the praetor gives them the possession of goods they become quasi heirs, and are called 'possessors of goods'. And several additional grades of grantees of possession were recognized by the praetor in his anxiety that no one might die without a successor; the right of entering upon an inheritance, which had been confined by the statute of the Twelve Tables within very narrow limits, having been conferred more extensively by him in the spirit of justice and equity. The following are the kinds of testamentary 3
possession of goods. First, the so-called 'contratabular' possession, given to children who are merely passed over in the will. Second, that which the praetor promises to all duly instituted heirs, and which is for that reason called

'*secundum tabulas*'. Then, having spoken of wills, the praetor passes on to cases of intestacy, in which, firstly, he gives the possession of goods which is called *unde liberi* to family heirs and those who in his Edict are ranked as such. Failing these, he gives it, secondly, to successors having a statutory title: thirdly, to the ten persons whom he preferred to the manumitter of a free person, if a stranger in relation to the latter, namely the latter's father and mother, grandparents paternal and maternal, children, grandchildren by daughters as well as by sons, and brothers and sisters whether of the whole or of the half blood only. The fourth degree of possession is that given to the nearest cognates: the fifth is that called *tum quam ex familia*: the sixth, that given to the patron and patroness, their children and parents: the seventh, that given to the husband or wife of the deceased; the eighth,
4 that given to the cognates of the manumitter. Such was the system established by the praetorian jurisdiction. We, however, who have been careful to pass over nothing, but correct all defects by our constitutions, have retained, as necessary, the possession of goods called *contra tabulas* and *secundum tabulas*, and also the kinds of possession upon intestacy
5 known as *unde liberi* and *unde legitimi*. The possession, however, which in the praetor's Edict occupied the fifth place, and was called *unde decem personae*, we have with benevolent intentions and with a short treatment shown to be superfluous. Its effect was to prefer to the extraneous manumitter the ten persons specified above; but our constitution, which we have made concerning the emancipation of children, has in all cases made the parent implicitly the manumitter, as previously under a fiduciary contract, and has attached this privilege to every such manumission, so as to render superfluous the aforesaid kind of possession of goods. We have therefore removed it, and put in its place the possession which the praetor promises to the nearest cognates, and which we have
6 thus made the fifth kind instead of the sixth. The possession of goods which formerly stood seventh in the list, which was called *tum quam ex familia*, and that which stood eighth, namely, the possession entitled *unde liberi patroni patronaeque et parentes eorum*, we have altogether suppressed by our

constitution respecting the rights of patrons. For, having assimilated the succession to freedmen to the succession to free-born persons, with this sole exception—in order to preserve some difference between the two classes—that no one has any title to the former who is related more distantly than the fifth degree, we have left them sufficient remedies in the 'contratabular' possession, and in those called *unde legitimi* and *unde cognati*, wherewith to vindicate their rights, so that thus all the subtleties and inextricable confusion of these two kinds of possession of goods have been abolished. We have 7
preserved in full force another possession of goods, which is called *unde vir et uxor*, and which occupied the ninth place in the old classification, and have given it a higher place, namely, the sixth. The tenth kind, which was called *unde cognati manumissoris*, we have very properly abolished for reasons which have been already stated: thus leaving in full operation only six ordinary kinds of possession of goods. The seventh, which follows them, was introduced with most 8
excellent reason by the praetors, whose Edict finally promised the possession of goods to those persons expressly entitled to it by any statute, senatusconsult, or imperial constitution; but this was not permanently incorporated by the praetor with either the intestate or the testamentary kinds of possession, but was accorded by him, as circumstances demanded, as an extreme and extraordinary remedy to those persons who claim, either under a will or on an intestacy, under statutes, senatusconsults, or the more recent legislation of the emperors. The praetor, having thus introduced many 9
kinds of successions, and arranged them in a system, fixed a definite time within which the possession of goods must be applied for, as there are often several persons entitled in the same kind of succession, though related in different degrees to the deceased, in order to save the creditors of the estate from delay in their suits, and to provide them with a proper defendant to sue; and with the object also of making it less easy for them to obtain possession of the property of the deceased, as in bankruptcy, wherein they consulted their own advantage only. He allowed to children and parents, adoptive no less than natural, an interval of a

year, and to all other persons one hundred days, within
10 which to make the application. If a person entitled does not apply for the possession of goods within the time specified, his portion goes by accrual to those in the same degree or class with himself: or, if there be none, the praetor promises by his successory edict the possession to those in the next degree, exactly as if the person in the preceding one were non-existent. If any one refuses the possession of goods which he has the opportunity of accepting, it is not usual to wait until the aforesaid interval, within which possession must be applied for, has elapsed, but the next degree is admitted
11 immediately under the same edict. In reckoning the interval, only those days are considered upon which the persons
12 entitled could have made application. Earlier emperors, however, have judiciously provided that no one need trouble himself expressly to apply for the possession of goods, but that, if he shall within the prescribed time in any manner have signified his intention to accept, he shall have the full benefit of such tacit acceptance.

TITLE X

OF ACQUISITION BY ADROGATION

There is another kind of universal succession which owes its introduction neither to the statute of the Twelve Tables nor to the praetor's Edict, but to the law which is based
1 upon custom and consent. When an independent person gives himself in adrogation, all his property, corporeal and incorporeal, and all debts due to him formerly passed in full ownership to the adrogator, except such rights as are extinguished by loss of status, for instance, bounden services of freedmen and rights of agnation. Use and usufruct, though formerly enumerated among such rights, have now been saved by our constitution from extinction by the least loss of status.
2 But we have now confined acquisition by adrogation within the same limits as acquisition through their children by natural parents; that is to say, adoptive as well as natural parents acquire no greater right in property which comes to children in their power from any extraneous source than a mere usufruct; the ownership is vested in the children them-

selves. But if a son who has been adrogated dies in his adoptive family, the whole of his property vests in the adrogator, failing those persons who, under our constitution, are preferred to the father in succession to property which is not acquired immediately from him. Conversely, the adrogator 3
is not, by strict law, suable for the debts of his adoptive son, but an action may be brought against him as his representative; and if he declines to defend the latter, the creditors are allowed, by an order of the magistrates having jurisdiction in such cases, to take possession of the property of which the usufruct as well as the ownership would have belonged to the son, had he not subjected himself to the power of another, and to dispose of it in the mode prescribed by law.

TITLE XI

OF THE ADJUDICATION OF A DECEASED PERSON'S ESTATE TO PRESERVE GIFTS OF LIBERTY

A new form of succession was added by a constitution of the Emperor Marcus, which provided that if slaves, who have received a bequest of liberty from their master in a will under which no heir takes, wish to have his property adjudged to them, in order that effect may be given to the gift of freedom, their application shall be entertained. Such is the 1
substance of a rescript addressed by the Emperor Marcus to Popilius Rufus, which runs as follows: 'If there is no successor to take on the intestacy of Virginius Valens, who by his will has conferred freedom on certain of his slaves, and if, consequently, his property is in danger of being sold, the magistrate who has cognizance of such matters shall on application entertain your desire to have the property adjudged to you, in order to give effect to the bequests of liberty, direct and fiduciary, provided you give proper security to the creditors for payment of their claims in full. Slaves to whom liberty has been directly bequeathed shall become free exactly as if the inheritance had been actually accepted, and those whom the heir was requested to manumit shall obtain their liberty from you; provided that if you will have the property adjudged to you only upon the condition, that even the slaves who have received a direct bequest of liberty shall become

your freedmen, and if they, whose status is now in question, agree to this, we are ready to authorize compliance with your wishes. And lest the benefit afforded by this our rescript be rendered ineffectual in another way, by the Treasury laying claim to the property, be it hereby known to those engaged in our service that the cause of liberty is to be preferred to pecuniary advantage, and that they must so effect such seizures as to preserve the freedom of those who could have obtained it had the inheritance been accepted
2 under the will.' This rescript was a benefit not only to slaves thus liberated, but also to the deceased testators themselves, by saving their property from being seized and sold by their creditors; for it is certain that such seizure and sale cannot take place if the property has been adjudged on this account, because some one has come forward to defend the deceased, and a satisfactory defender too, who gives the creditors full
3 security for payment. Primarily, the rescript is applicable only where freedom is conferred by a will. How then will the case stand, if a man who dies intestate makes gifts of freedom by codicils, and on the intestacy no one accepts the inheritance? We answer, that the boon conferred by the constitution ought not here to be refused. No one can doubt that liberty given, in codicils, by a man who dies having
4 made a will, is effectual. The terms of the constitution show that it comes into application when there is no successor on an intestacy; accordingly, it is of no use so long as it is uncertain whether there will be one or not; but, when this has been determined in the negative, it at once becomes
5 applicable. Again, it may be asked whether, if a person who abstains from accepting an inheritance can claim a judicial restoration of rights, the constitution can still be applied, and the goods adjudged under it? And what, if such person obtains a restoration after they have been actually adjudged in order to give effect to the bequest of freedom? We reply that gifts of liberty to which effect has once been given
6 cannot possibly be recalled. The object with which this constitution was enacted was to give effect to bequests of liberty, and accordingly it is quite inapplicable where no such bequests are made. Supposing, however, that a man

manumits certain slaves in his lifetime, or in contemplation of death, and, in order to prevent any questions arising whether the creditors have thereby been defrauded, the slaves are desirous of having the property adjudged to them, should this be permitted? and we are inclined to say that it should, though the point is not covered by the terms of the constitution. Perceiving, however, that the enactment was wanting in many minute points of this kind, we have ourselves issued a very full constitution, in which have been collected many conceivable cases by which the law relating to this kind of succession has been completed, and with which any one can become acquainted by reading the constitution itself. 7

TITLE XII

OF UNIVERSAL SUCCESSIONS, NOW OBSOLETE, IN SALE OF GOODS UPON BANKRUPTCY, AND UNDER THE SC. CLAUDIANUM.

There were other kinds of universal succession in existence prior to that last before mentioned; for instance, the 'purchase of goods' which was introduced with many prolixities of form for the sale of insolvent debtors' estates, and which remained in use under the so-called 'ordinary' system of procedure. Later generations adopted the 'extraordinary' procedure, and accordingly sales of goods became obsolete along with the ordinary procedure of which they were a part. Creditors are now allowed to take possession of their debtor's property only by the order of a judge, and to dispose of it as to them seems most advantageous; all of which will appear more perfectly from the larger books of the Digest. There was 1
too a miserable form of universal acquisition under the SC. Claudianum, when a free woman, through indulgence of her passion for a slave, lost her freedom by the senatusconsult, and with her freedom her property. But this enactment we deemed unworthy of our times, and have ordered its abolition in our Empire, nor allowed it to be inserted in our Digest.

TITLE XIII

OF OBLIGATIONS

Let us now pass on to obligations. An obligation is a legal bond, with which we are bound by a necessity of per-
1 forming some act according to the laws of our State. The leading division of obligations is into two kinds, civil and praetorian. Those obligations are civil which are established by statute, or at least are sanctioned by the civil law; those are praetorian which the praetor has established by his own
2 jurisdiction, and which are also called honorary. By another division they are arranged in four classes, contractual, quasi-contractual, delictal, and quasi-delictal. And, first, we must examine those which are contractual, and which again fall into four species, for contract is concluded either by delivery, by a form of words, by writing, or by consent: each of which we will treat in detail.

TITLE XIV

OF REAL CONTRACTS, OR THE MODES IN WHICH OBLIGATIONS ARE CONTRACTED BY DELIVERY

Real contracts, or contracts concluded by delivery, are exemplified by loan for consumption, that is to say, loan of such things as are estimated by weight, number, or measure, for instance, wine, oil, corn, coined money, copper, silver, or gold: things in which we transfer our property on condition that the receiver shall transfer to us, at a future time, not the same things, but other things of the same kind and quality: and this contract is called *mutuum*, because thereby *meum* or mine becomes *tuum* or thine. The action to which it gives
1 rise is called a condiction. Again, a man is bound by a real obligation if he takes what is not owed him from another who pays him by mistake; and the latter can, as plaintiff, bring a condiction against him for its recovery, after the analogy of the action whose formula ran 'if it be proved that he ought to convey', exactly as if the defendant had received a loan from him. Consequently a pupil who, by mistake, is paid something which is not really owed him without his guardian's authority, will be no more bound by a condiction for the

recovery of money not owed than by one for money received as a loan: though this kind of liability does not seem to be founded on contract; for a payment made in order to discharge a debt is intended to extinguish, not to create, an obligation. So too a person to whom a thing is lent for use is laid under 2
a real obligation, and is liable to the action on a loan for use. The difference between this case and a loan for consumption is considerable, for here the intention is not to make the object lent the property of the borrower, who accordingly is bound to restore the same identical thing. Again, if the receiver of a loan for consumption loses what he has received by some accident, such as fire, the fall of a building, shipwreck, or the attack of thieves or enemies, he still remains bound: but the borrower for use, though responsible for the greatest care in keeping what is lent him—and it is not enough that he has shown as much care as he usually bestows on his own affairs, if only some one else could have been more diligent in the charge of it—has not to answer for loss occasioned by fire or accident beyond his control, provided it did not occur through any fault of his own. Otherwise, of course, it is different: for instance, if you choose to take with you on a journey a thing which has been lent to you for use, and lose it by being attacked by enemies or thieves, or by a shipwreck, it is beyond question that you will be liable for its restoration. A thing is not properly said to be lent for use if any recompense is received or agreed upon for the service; for where this is the case, the use of the thing is held to be hired, and the contract is of a different kind, for a loan for use ought always to be gratuitous. Again, the obligation incurred by 3
a person with whom a thing is deposited for custody is real, and he can be sued by the action of deposit; he too being responsible for the restoration of the identical thing deposited, though only where it is lost through some positive act of commission on his part: for for carelessness, that is to say, inattention and negligence, he is not liable. Thus a person from whom a thing is stolen, in the charge of which he has been most careless, cannot be called to account, because, if a man entrusts property to the custody of a careless friend, he has no one to blame but himself for his want of caution.

4 Finally, the creditor who takes a thing in pledge is under a real obligation, and is bound to restore the thing itself by the action of pledge. A pledge, however, is for the benefit of both parties; of the debtor, because it enables him to borrow more easily, and of the creditor, because he has the better security for repayment; and accordingly, it is a settled rule that the pledgee cannot be held responsible for more than the greatest care in the custody of the pledge; if he shows this, and still loses it by some accident, he himself is freed from all liability, without losing his right to sue for the debt.

TITLE XV

OF VERBAL OBLIGATION

An obligation is contracted by question and answer, that is to say, by a form of words, when we stipulate that property shall be conveyed to us, or some other act be performed in our favour. Such verbal contracts ground two different actions, namely condiction, when the stipulation is certain, and the action on stipulation, when it is uncertain; and the name is derived from *stipulum*, a word in use among the ancients to mean 'firm', coming possibly from *stipes*, the trunk of a tree.

1 In this contract the following forms of words were formerly sanctioned by usage: 'Do you engage yourself to do so and so?' 'I do engage myself.' 'Do you promise?' 'I do promise.' 'Do you pledge your credit?' 'I pledge my credit.' 'Do you guarantee?' 'I guarantee.' 'Will you convey?' 'I will convey.' 'Will you do?' 'I will do.' Whether the stipulation is in Latin, or Greek, or any other language, is immaterial, provided the two parties understand one another, so that it is not necessary even that they should both speak in the same tongue, so long as the answer corresponds to the question, and thus two Greeks, for instance, may contract an obligation in Latin. But it was only in former times that the solemn forms referred to were in use: for subsequently, by the enactment of Leo's constitution, their employment was rendered unnecessary, and nothing was afterwards required except that the parties should understand

each other, and agree to the same thing, the words in which such agreement was expressed being immaterial.

The terms of a stipulation may be absolute, or performance 2
may either be postponed to some future time, or be made subject to a condition. An absolute stipulation may be exemplified by the following: 'Do you promise to give five *aurei*?' and here (if the promise be made) that sum may be instantly sued for. As an instance of a stipulation '*in diem*', as it is called where a future day is fixed for payment, we may take the following: 'Do you promise to give ten *aurei* on the first of March?' In such a stipulation as this, an immediate debt is created, but it cannot be sued upon until the arrival of the day fixed for payment: and even on that very day an action cannot be brought, because the debtor ought to have the whole of it allowed to him for payment; for otherwise, unless the whole day on which payment was promised is past, it cannot be certain that default has been made. If the terms of your stipulation run 'Do you promise 3
to pay me ten *aurei* a year so long as I live?' the obligation is deemed absolute, and the liability perpetual, for a debt cannot be owed till a certain time only; though if the promisee's heir sues for payment, he will be successfully met by the plea of contrary agreement. A stipulation is conditional, 4
when performance is made to depend on some uncertain event in the future, so that it becomes actionable only on something being done or omitted: for instance, 'Do you promise to give five *aurei* if Titius is made consul?' If, however, a man stipulates in the form 'Do you promise to give so and so, if I do not go up to the Capitol?' the effect is the same as if he had stipulated for payment to himself at the time of his death. The immediate effect of a conditional stipulation is not a debt, but merely the expectation that at some time there will be a debt: and this expectation devolves on the stipulator's heir, supposing he dies himself before fulfilment of the condition. It is usual in stipulations to name a 5
place for payment; for instance, 'Do you promise to give at Carthage?' Such a stipulation as this, though in its terms absolute, implies a condition that enough time shall be allowed to the promisor to enable him to pay the money

at Carthage. Accordingly, if a man at Rome stipulates thus, 'Do you promise to pay to-day at Carthage?' the stipulation is void, because the performance of the act to be promised
6 is a physical impossibility. Conditions relating to past or present time either make the obligation void at once, or have no suspensive operation whatever. Thus, in the stipulation 'Do you promise to give so and so, if Titius has been consul, or if Maevius is alive?' the promise is void, if the condition is not satisfied; while if it is, it is binding at once: for events which in themselves are certain do not suspend the binding force of an obligation, however uncertain we ourselves may be about them.

7 The performance or non-performance of an act may be the object of a stipulation no less than the delivery of property, though where this is the case, it will be best to connect the non-performance of the act to be performed, or the performance of the act to be omitted, with a pecuniary penalty to be paid in default, lest there be a doubt as to the value of the act or omission, which will make it necessary for the plaintiff to prove to what damages he is entitled. Thus, if it be a performance which is stipulated for, some such penalty should be added as in the following: 'If so and so is not done, do you promise to pay ten *aurei* as a penalty?' And if the performance of some acts, and the non-performance of others, are bargained for in the same stipulation, a clause of the following kind should be added, 'If any default is made, either as contrary to what is agreed upon, or by way of non-performance, do you promise to pay a penalty of ten *aurei*?

TITLE XVI

OF STIPULATIONS IN WHICH THERE ARE TWO CREDITORS OR TWO DEBTORS

There may be two or more parties on either side in a stipulation, that is to say, as promisors or promisees. Joint promisees are so constituted by the promisor answering, 'I promise,' after they have all first asked the question; for instance, if after two promisees have separately stipulated from him, he answers, 'I promise to give so and so to each of you.' But if he first promises to Titius, and then, on another's

putting the question to him, promises to him too, there will be two distinct obligations, namely, one between him and each of the promisees, and they are not considered joint promisees at all. The usual form to constitute two or more joint promisors is as follows,—'Maevius, do you promise to give five *aurei*? Seius, do you promise to give the same five *aurei*?' and in answer they reply separately, 'I promise.' In obligations of 1
this kind each joint promisee is owed the whole sum, and the whole sum can be claimed from each joint promisor; and yet in both cases but one payment is due, so that if one joint promisee receives the debt, or one joint promisor pays it, the obligation is thereby extinguished for all, and all are thereby released from it. Of two joint promisors one may 2
be bound absolutely, while performance by the other is postponed to a future day, or made to depend on a condition; but such postponement or such condition in no way prevents the stipulator from at once suing the one who was bound absolutely.

TITLE XVII

OF STIPULATIONS MADE BY SLAVES

From his master's legal capacity a slave derives ability to be promisee in a stipulation. Thus, as an inheritance in most matters represents the legal 'person' of the deceased, whatever a slave belonging to it stipulates for, before the inheritance is accepted, he acquires for the inheritance, and so for the person who subsequently becomes heir. All that a slave 1
acquires by a stipulation he acquires for his master only, whether it was to that master, or himself, or his fellow slave, or no one in particular that performance was to be made under the contract; and the same principle applies to children in power, so far as they now are instruments of acquisition for their father. When, however, what is stipulated for is permission to do some 2
specific act, that permission cannot extend beyond the person of the promisee: for instance, if a slave stipulates for permission to cross the promisor's land, he cannot himself be denied passage, though his master can. A stipulation by a slave 3
belonging to joint owners enures to the benefit of all of them in proportion to the shares in which they own him, unless he

stipulated at the bidding, or expressly in favour, of one of them only, in which case that one alone is benefited. Where a jointly owned slave stipulates for the transfer of property which cannot be acquired for one of his two masters, the contract enures to the benefit of the other only: for instance, where the stipulation is for the transfer of a thing which already belongs to one of them.

TITLE XVIII

OF THE DIFFERENT KINDS OF STIPULATIONS

Stipulations are either judicial, praetorian, conventional, or common: by the latter being meant those which are both
1 praetorian and judicial. Judicial stipulations are those which it is simply part of the judge's duty to require; for instance, security against fraud, or for the pursuit of a runaway slave,
2 or (in default) for payment of his value. Those are praetorian, which the praetor is bound to exact simply in virtue of his magisterial functions; for instance, security against apprehended damage, or for payment of legacies by an heir. Under praetorian stipulations we must include also those directed by the aedile, for these too are based upon jurisdic-
3 tion. Conventional stipulations are those which arise merely from the agreement of the parties, apart from any direction of a judge or of the praetor, and which one may almost say are of as many different kinds as there are conceivable objects to
4 a contract. Common stipulations may be exemplified by that by which a guardian gives security that his ward's property will not be squandered or misappropriated, which he is sometimes required to enter into by the praetor, and sometimes also by a judge when the matter cannot be managed in any other way; or, again, we might take the stipulation by which an agent promises that his acts shall be ratified by his principal.

TITLE XIX

OF INVALID STIPULATIONS

Anything, whether movable or immovable, which admits of private ownership, may be made the object of a stipulation;
1 but if a man stipulates for the delivery of a thing which either

does not or cannot exist, such as Stichus, who is dead but whom he thought alive, or an impossible creature, like a hippocentaur, the contract will be void. Precisely the same 2 principle applies where a man stipulates for the delivery of a thing which is sacred or religious, but which he thought was a subject of human ownership, or of a thing which is public, that is to say, devoted in perpetuity to the use and enjoyment of the people at large, like a forum or theatre, or of a free man whom he thought a slave, or of a thing which he is incapable of owning, or which is his own already. And the fact that a thing which is public may become private property, that a free man may become a slave, that the stipulator may become capable of owning such and such a thing, or that such and such a thing may cease to belong to him, will not avail to merely suspend the force of the stipulation in these cases, but it is void from the outset. Conversely, a stipulation which originally was perfectly good may be avoided by the thing, which is its object, acquiring any of the characters just specified through no fault of the promisor. And a stipulation, such as 'do you promise to convey Lucius Titius when he shall be a slave?' and others like it, are also void from the beginning; for objects which by their very nature cannot be owned by man cannot either in any way be made the object of an obligation. If one man promises that another shall convey, or 3 do so and so, as, for instance, that Titius shall give five *aurei*, he will not be bound, though he will if he promises to get Titius to give them. If a man stipulates for conveyance to, 4 or performance in favour of, another person who is not his paterfamilias, the contract is void; though of course performance to a third person may be bargained for (as in the stipulation 'do you promise to give to me or to Seius?'); where, though the obligation is created in favour of the stipulator only, payment may still be lawfully made to Seius, even against the stipulator's will, the result of which, if it is done, being that the promisor is entirely released from his obligation, while the stipulator can sue Seius by the action of agency. If a man stipulates for payment of ten *aurei* to himself and another who is not his paterfamilias, the contract will be good, though there has been much doubt whether in

such a case the stipulator can sue for the whole sum agreed upon, or only half; the law is now settled in favour of the smaller sum. If you stipulate for performance in favour of one in your power, all benefit under the contract is taken by yourself, for your words are as the words of your son, as his words are as yours, in all cases in which he is merely an
5 instrument of acquisition for you. Another circumstance by which a stipulation may be avoided is want of correspondence between question and answer, as where a man stipulates from you for payment of ten *aurei*, and you promise five, or vice versa; or where his question is unconditional, your answer conditional, or vice versa, provided only that in this latter case the difference is express and clear; that is to say, if he stipulates for payment on fulfilment of a condition, or on some determinate future day, and you answer: 'I promise to pay to-day,' the contract is void; but if you merely answer: 'I promise,' you are held by this laconic reply to have undertaken payment on the day, or subject to the condition specified; for it is not essential that every word used by the stipulator should
6 be repeated in the answer of the promise. Again, no valid stipulation can be made between two persons of whom one is in the power of the other. A slave indeed cannot be under an obligation to either his master or anybody else: but children in power can be bound in favour of any one except their own
7 paterfamilias. The dumb, of course, cannot either stipulate or promise, nor can the deaf, for the promisee in stipulation must hear the answer, and the promisor must hear the question; and this makes it clear that we are speaking of persons only who are stone deaf, not of those who (as it is said) are hard of
8 hearing. A lunatic cannot enter into any contract at all,
9 because he does not understand what he is doing. On the other hand a pupil can enter into any contract, provided that he has his guardian's authority, when necessary, as it is for incurring an obligation, though not for imposing an obligation
10 on another person. This concession of legal capacity of disposition is manifestly reasonable in respect of children who have acquired some understanding, for children below the age of seven years, or who have just passed that age, resemble lunatics in want of intelligence. Those, however, who have

just completed their seventh year are permitted, by a beneficent interpretation of the law, in order to promote their interests, to have the same capacity as those approaching the age of puberty; but a child below the latter age, who is in paternal power, cannot bind himself even with his father's sanction. An impossible condition annexed to an obligation 11
invalidates the stipulation. An impossible condition is one which, according to the course of nature, cannot be fulfilled, as, for instance, if one says: 'Do you promise to give if I touch the sky with my finger?' But if the stipulation runs: 'Do you promise to give if I do not touch the sky with my finger?' it is considered unconditional, and accordingly can be sued upon at once. Again, a verbal obligation made between 12
persons who are not present with one another is void. This rule, however, afforded contentious persons opportunities of litigation, by alleging, after some interval, that they, or their adversaries, had not been present on the occasion in question; and we have therefore issued a constitution, addressed to the advocates of Caesarea, in order with the more dispatch to settle such disputes, whereby it is enacted that written documents in evidence of a contract which recite the presence of the parties shall be taken to be indisputable proof of the fact, unless the person, who resorts to allegations usually so disgraceful, proves by the clearest evidence, either documentary or borne by credible witnesses, that he or his adversary was elsewhere than alleged during the whole day on which the document is stated to have been executed. Formerly, a man 13
could not stipulate that a thing should be conveyed to him after his own death, or after that of the promisor; nor could one person who was in another's power even stipulate for conveyance after that other's death, because he was deemed to speak with the voice of his parent or master; and stipulations for conveyance the day before the promisee's or promisor's decease were also void. Stipulations, however, as has already been remarked, derive their validity from the consent of the contracting parties, and we therefore introduced a necessary emendation in respect also of this rule of law, by providing that a stipulation shall be good which bargains for performance either after the death, or the day before the

14 death, of either promisee or promisor. Again, a stipulation in the form: 'Do you promise to give to-day, if such or such a ship arrives from Asia to-morrow?' was formerly void, as being preposterous in its expression, because what should come last is put first. Leo, however, of famous memory held that a preposterous stipulation in the settlement of a dowry ought not to be rejected as void, and we have determined to allow it perfect validity in every case, and not merely in that
15 in which it was formerly sanctioned. A stipulation, say by Titius, in the form: 'Do you promise to give when I shall die' or 'when you shall die'? is good now, as indeed it always
16 was even under the older law. So too a stipulation for per-
17 formance after the death of a third person is good. If a document in evidence of a contract states that so and so promised, the promise is deemed to have been given in answer to a
18 preceding question. When several acts of conveyance or performance are comprised in a single stipulation, if the promisor simply answer: 'I promise to convey,' he becomes liable on each and all of them, but if he answers that he will convey only one or some of them, he incurs an obligation in respect of those only which are comprised in his answer, there being in reality several distinct stipulations of which only one or some are considered to have acquired binding force: for for each act of conveyance or performance there ought to be a
19 separate question and a separate answer. As has been already observed, no one can validly stipulate for performance to a person other than himself, for the purpose of this kind of obligation is to enable persons to acquire for themselves that whereby they are profited, and a stipulator is not profited if the conveyance is to be made to a third person. Hence, if it be wished to make a stipulation in favour of any such third person, a penalty should be stipulated for, to be paid, in default of performance of that which is in reality the object of the contract, to the party who otherwise would have no interest in such performance; for when one stipulates for a penalty, it is not his interest in what is the real contract which is considered, but only the amount to be forfeited to him upon non-fulfilment of the condition. So that a stipulation for conveyance to Titius, but made by some one else,

is void: but the addition of a penalty, in the form 'If you do not convey, do you promise to pay me so many *aurei*?' makes it good and actionable. But where the promisee stipu- 20
lates in favour of a third person, having himself an interest in the performance of the promise, the stipulation is good. For instance, if a guardian, after beginning to exercise his tutorial functions, retires from their exercise in favour of his fellow guardian, taking from him by stipulation security for the due charge of the ward's property, he has a sufficient interest in the performance of this promise, because the ward could have sued him in case of maladministration, and therefore the obligation is binding. So too a stipulation will be good by which one bargains for delivery to one's agent, or for payment to one's creditor, for in the latter case one may be so far interested in the payment that, if it be not made, one will become liable to a penalty or to having a foreclosure of estates which one has mortgaged. Conversely, he who promises that 21
another shall do so and so is not bound unless he promises a penalty in default; and, again, a man cannot validly stipulate 22
that property which will hereafter be his shall be conveyed to him as soon as it becomes his own. If the stipulator 23
and the promisor mean different things, there is no contractual obligation, but it is just as if no answer had been made to the question; for instance, if one stipulates from you for Stichus, and you think he means Pamphilus, whose name you believed to be Stichus. A promise made for an illegal or 24
immoral purpose, as, for instance, to commit a sacrilege or homicide, is void.

If a man stipulates for performance on the fulfilment of a 25
condition, and dies before such fulfilment, his heir can sue on the contract when it occurs: and the heir of the promisor can be sued under the same circumstances. A stipulation for a con- 26
veyance this year, or this month, cannot be sued upon until the whole year, or the whole month, has elapsed: and simi- 27
larly the promisee cannot sue immediately upon a stipulation for the conveyance of an estate or a slave, but only after allowing a sufficient interval for the conveyance to be made.

TITLE XX

OF FIDEJUSSORS OR SURETIES

Very often other persons, called fidejussors or sureties, are bound for the promisor, being taken by promisees as addi-
1 tional security. Such sureties may accompany any obligation, whether real, verbal, literal or consensual: and it is immaterial even whether the principal obligation be civil or natural, so that a man may go surety for the obligation of a slave
2 either to a stranger or to his master. A fidejussor is not only bound himself, but his obligation devolves also on his heir;
3 and the contract of suretyship may be entered into before no
4 less than after the creation of the principal obligation. If there are several fidejussors to the same obligation, each of them, however many they are, is liable for the whole amount, and the creditor may sue whichever he chooses for the whole; but by the letter of Hadrian he may be compelled to sue for only an aliquot part, determined by the number of sureties who are solvent at the commencement of the action: so that if one of them is insolvent at that time the liability of the rest is proportionately increased. Thus, if one fidejussor pay the whole amount, he alone suffers by the insolvency of the principal debtor; but this is his own fault, as he might have availed himself of the letter of Hadrian, and required that the
5 claim should be reduced to his rateable portion. Fidejussors cannot be bound for more than their principal, for their obligation is but accessory to the latter's, and the accessory cannot contain more than the principal; but they can be bound for less. Thus, if the principal debtor promised ten *aurei*, the fidejussor can well be bound for five, but not vice versa; and if the principal's promise is absolute, that of the fidejussor may be conditional, though a conditional promise cannot be absolutely guaranteed, for more and less is to be understood of time as well as of quantity, immediate payment
6 being regarded as more, and future payment as less. For the recovery of anything paid by him for the principal the fide-
7 jussor can sue the latter by the action on agency. A fidejussor may be taken in Greek, by using the expressions τῇ ἐμῇ πίστει κελεύω, λέγω, θέλω, or βούλομαι; and φημί will be taken as

equivalent to λέγω. It is to be observed that in the stipulations 8
of fidejussors the general rule is that whatever is stated in writing to have been done is taken to have really been done; and, accordingly, it is settled law that if a man signs his name to a paper stating that he became a fidejussor, all formalities are presumed to have been duly observed.

TITLE XXI

OF LITERAL OBLIGATION

Formerly there was a kind of obligation made by writing, and said to be contracted by the entry of a debt in a ledger; but such entries have nowadays gone out of use. Of course, if a man states in writing that he owes money which has never been paid over to him, he cannot be allowed, after a considerable interval, to defend himself by the plea that the money was not, in fact, advanced; for this is a point which has frequently been settled by imperial constitutions. The consequence is, that even at the present day a person who is estopped from this plea is bound by his written signature, which (even of course where there is no stipulation) is ground for a condiction. The length of time after which this defence could not be pleaded was formerly fixed by imperial constitutions at five years; but it has been reduced by our constitution, in order to save creditors from a more extended risk of being defrauded of their money, so that now it cannot be advanced after the lapse of two years from the date of the alleged payment.

TITLE XXII

OF OBLIGATION BY CONSENT

Obligations contracted by mere consent are exemplified by sale, hire, partnership and agency, which are called consensual contracts because no writing, nor the presence of the parties, nor any delivery is required to make the obligation actionable, but the consent of the parties is sufficient. Parties who are not present together, therefore, can form these contracts by letter, for instance, or by messenger: and they are in their nature bilateral, that is, both parties incur a reciprocal

obligation to perform whatever is just and fair, whereas verbal contracts are unilateral, one party being promisee, and the other alone promisor.

TITLE XXIII

OF PURCHASE AND SALE

The contract of purchase and sale is complete immediately the price is agreed upon, and even before the price or as much as any earnest is paid: for earnest is merely evidence of the completion of the contract. In respect of sales unattested by any written evidence this is a reasonable rule, and so far as they are concerned we have made no innovations. By one of our constitutions, however, we have enacted, that no sale effected by an agreement in writing shall be good or binding, unless that agreement is written by the contracting parties themselves, or, if written by some one else, is at least signed by them, or finally, if written by a notary, is duly drawn by him and executed by the parties. So long as any of these requirements is unsatisfied, there is room to retract, and either purchaser or vendor may withdraw from the agreement with impunity—provided, that is to say, that no earnest has been given. Where earnest has been given, and either party refuses to perform the contract, that party, whether the agreement be in writing or not, if purchaser forfeits what he has given, and if vendor is compelled to restore double what he has received, even though there has been no express agreement in the matter of earnest.

1 It is necessary that the price should be settled, for without a price there can be no purchase and sale, and it ought to be a fixed and certain price. For instance, where the parties agreed that the thing should be sold at a price to be subsequently fixed by Titius, the older jurists doubted much whether this was a valid contract of sale or not. The doubt has been settled in the following way by our decision; if the third person named actually fixes the price, it must certainly be paid, as settled by him, and the thing must be delivered, in order to give effect to the sale; the purchaser (if not fairly treated) suing by the action on purchase, and the vendor by the action on sale. But if the third person named will not or

cannot fix the price, the sale will be void, because no price has been settled. This rule, which we have adopted with regard to sales, may reasonably be extended also to contracts of hire. The price, too, should be in money; for it used to be 2 much disputed whether anything else, such as a slave, a piece of land, or a robe, could be treated as price. Sabinus and Cassius held the affirmative, explaining thus the common theory that exchange is a species, and the oldest species, of purchase and sale; and in their support they quoted the lines of Homer, who says in a certain passage that the army of the Greeks procured themselves wine by giving other things in exchange, the actual words being as follow: 'then the long-haired Greeks bought themselves wine, some with bronze, some with shining iron, some with hides, some with live oxen, some with slaves.'[1] The other school maintained the negative, and distinguished between exchange on the one hand, and purchase and sale on the other: for if an exchange were the same thing as a sale, it would be impossible to determine which is the thing sold, and which is the price, and both things cannot be regarded in each of these characters. The opinion, however, of Proculus, who affirmed that exchange was a species of contract apart by itself, and distinct from sale, has deservedly prevailed, as it is confirmed by other lines from Homer, and by still more cogent reasons, and this has been admitted by preceding Emperors, and is fully stated in our Digest. As soon as the 3 contract of sale is concluded—that is, as we have said, as soon as the price is agreed upon, if the contract is not in writing—the thing sold is immediately at the risk of the purchaser, even though it has not yet been delivered to him. Accordingly, if a slave dies, or is injured in any part of his body, or if a house is either totally or partially burnt down, or if a piece of land is wholly or partially swept away by a river flood, or is reduced in acreage by an inundation, or made of less value by a storm blowing down some of its trees, the loss falls on the purchaser, who must pay the price even though he has not got what he purchased. The vendor is not responsible and does not suffer for anything not due to any design or fault of his own. If, however, after the purchase of a piece of

[1] II. vii. 472 sqq.

land, it receives an increase by alluvion, it is the purchaser who profits thereby: for the profit ought to belong to him who also bears the risk. And if a slave who has been sold runs away, or is stolen, without any design or fault of the vendor, one should look to see whether the latter expressly undertook to keep him safely until delivery was made; for, if he did this, the loss falls upon him, though otherwise he incurs no liability: and this is a rule which applies to all animals and other objects whatsoever. The vendor, however, will be bound to transfer to the purchaser all his rights of action for the recovery of the object or damages, for, not having yet delivered it to the purchaser, he still remains its owner, and the same holds good of the penal actions on theft and on
4 unlawful damage. A sale may be made conditionally as well as absolutely. The following is an example of a conditional sale: 'If Stichus meets with your approval within a certain
5 time, he shall be purchased by you for so many *aurei*.' If a man buys a piece of land which is sacred, religious, or public, such as a forum or basilica, knowing it to be such, the purchase is void. But if the vendor has fraudulently induced him to believe that what he was buying was not sacred, or was private property, as he cannot legally have what he contracted for, he can bring the action on purchase to recover damages for what he has lost by the fraud; and the same rule applies to the purchase of a free man represented by the vendor to be a slave.

TITLE XXIV

OF LETTING AND HIRING

The contract of hire resembles very closely the contract of sale, and the same rules of law apply to both. Thus, as the contract of sale is concluded as soon as the price is agreed upon, so the contract of hire is held to be concluded as soon as the sum to be paid for the hiring is settled, and from that moment the letter has an action on the letting, and the hirer
1 on the hiring. What we have said above as to a sale in which the price is left to be fixed by a third person must be understood to apply also to a contract of hire in which the amount to be paid for hire is left to be fixed in the same way. Consequently, if a man gives clothes to a fuller to

clean or finish, or to a tailor to mend, and the amount of hire is not fixed at the time, but left to subsequent agreement between the parties, a contract of hire cannot properly be said to have been concluded, but an action is given on the circumstances, as amounting to an innominate contract. Again, 2
a question often arose in connexion with the contract of hire similar to that which was so common, namely, whether an exchange was a sale. For instance, what is the nature of the transaction if a man gives you the use or enjoyment of a thing, and receives in return the use or enjoyment of another thing from you? It is now settled that this is not a contract of hire, but a kind of contract apart by itself. Thus, if a man had one ox, and his neighbour another, and they agreed that each should in turn lend the other his ox for ten days to make use of, and then one of the oxen died while working for the man to whom it did not belong, an action cannot be brought on hire, nor on a loan for use, for a loan for use ought to be gratuitous: but an action should be brought as on an innominate contract. So nearly akin, indeed, is purchase and 3
sale to letting and hiring, that in some cases it is a question to which class of the two a contract belongs. As an instance may be taken those lands which are delivered over to be enjoyed for ever, upon the terms, that is to say, that so long as the rent is paid to the owner it shall not be lawful for the latter to take the lands away from either the original hirer, or his heir, or any one else to whom he or his heir has conveyed them by sale, gift, dowry, or in any other way whatsoever. The questionings of the earlier lawyers, some of whom thought this kind of contract a hiring, and others a sale, occasioned the enactment of the statute of Zeno, which determined that this contract of *emphyteusis*, as it is called, was of a peculiar nature, and should not be included under either hire or sale, but should rest on the terms of the agreement in each particular case: so that if anything were agreed upon between the parties, this should bind them exactly as if it were inherent in the very nature of the contract; while if they did not agree expressly at whose risk the land should be, it should be at that of the owner in case of total destruction, and at that of the tenant, if the injury were merely partial.

4 And these rules we have adopted in our legislation. Again, if a goldsmith agrees to make Titius rings of a certain weight and pattern out of his own gold for, say, ten *aurei*, it is a question whether the contract is purchase and sale or letting and hiring. Cassius says the material is bought and sold, the labour let and hired; but it is now settled that there is only a purchase and sale. But if Titius provided the gold, and agreed to pay him for his work, the contract is clearly a letting and hiring.

5 The hirer ought to observe all the terms of the contract, and in the absence of express agreement his obligations should be ascertained by reference to what is fair and equitable. Where a man has either given or promised hire for the use of clothes, silver, or a beast of burden, he is required in his charge of it to show as much care as the most diligent father of a family shows in his own affairs; if he do this, and still accidentally lose it, he will be under no obligation to re-
6 store either it or its value. If the hirer dies before the time fixed for the termination of the contract has elapsed, his heir succeeds to his rights and obligations in respect thereof.

TITLE XXV

OF PARTNERSHIP

A partnership either extends to all the goods of the partners, when the Greeks call it by the special name of κοινοπραξία, or is confined to a single sort of business, such as the
1 purchase and sale of slaves, oil, wine, or grain. If no express agreement has been made as to the division of the profit and loss, an equal division of both is understood to be intended, but if it has, such agreement ought to be carried into effect; and there has never been any doubt as to the validity of a contract between two partners that the one shall take two-thirds of the profits, and bear two-thirds of the loss, and that the remaining third shall be taken and borne respectively by
2 the other. If Titius and Seius agreed that the former should take two-thirds of the profits, and bear only one-third of the loss, and that the latter should bear two-thirds of the loss, and take only one-third of the profits, it has been made a question whether such an agreement ought to be held valid. Quintus

Mucius thought such an arrangement contrary to the very nature of partnership, and therefore not to be supported: but Servius Sulpicius, whose opinion has prevailed, was of a different view, because the services of a particular partner are often so valuable that it is only just to admit him to the business on more favourable terms than the rest. It is certain that a partnership may be formed on the terms that one partner shall contribute all the capital, and that the profits shall be divided equally, for a man's services are often equivalent to capital. Indeed, the opinion of Quintus Mucius is now so generally rejected, that it is admitted to be a valid contract that a partner shall take a share of the profits, and bear no share in the loss, which indeed Servius, consistently with his opinion, maintained himself. This of course must be taken to mean that if there is a profit on one transaction, and a loss on another, a balance should be struck, and only the net profit be considered as profits. It is quite clear that if the 3
shares are expressed in one event only, as for instance in the event of profit, but not in the event of loss, or vice versa, the same proportions must be observed, in the event of which no mention has been made, as in the other. The continuance of 4
partnership depends on the continuing consent of the members; it is dissolved by notice of withdrawal from any one of them. But of course if the object of a partner in withdrawing from the partnership is to fraudulently keep for himself some accruing gain—for instance, if a partner in all goods succeeds to an inheritance, and withdraws from the partnership in order to have exclusive possession thereof—he will be compelled to divide this gain with his partners; but what he gains undesignedly after withdrawing he keeps to himself, and his partner always has the exclusive benefit of whatever accrues to him after such withdrawal. Again, a partnership is dis- 5
solved by the death of a partner, for when a man enters into a contract of partnership, he selects as his partner a definite person. Accordingly, a partnership based on the agreement of even several persons is dissolved by the death of one of them, even though several others survive, unless when the contract was made it was otherwise agreed. So too a partner- 6
ship formed for the attainment of some particular object is

7 terminated when that object is attained. It is clear too that a partnership is dissolved by the forfeiture of the property of one of the partners, for such an one, as he is replaced by a
8 successor, is reckoned civilly dead. So again, if one of the partners is in such embarrassed circumstances as to surrender all his property to his creditors, and all that he possessed is sold to satisfy the public or private claims upon him, the partnership is dissolved, though if the members still agree to be partners, a new partnership would seem to have begun.
9 It has been doubted whether one partner is answerable to another on the action of partnership for any wrong less than fraud, like the bailee in a deposit, or whether he is not suable also for carelessness, that is to say, for inattention and negligence ; but the latter opinion has now prevailed, with this limitation, that a partner cannot be required to satisfy the highest standard of carefulness, provided that in partnership business he shows as much diligence as he does in his own private affairs: the reason for this being that if a man chooses as his partner a careless person, he has no one to blame but himself.

Title XXVI

OF AGENCY

Of the contract of agency there are five modes. A man gives you a commission either for his own exclusive benefit, or for his own and yours together, or for that of some third person, or for his own and the third person's, or for the third person's and yours. A commission given simply for the sake of the agent gives rise in reality to no relation of agency, and accordingly no obligation comes into existence, and therefore
1 no action. A commission is given solely for the benefit of the principal when, for instance, the latter instructs you to manage his business, to buy him a piece of land, or to enter
2 into a stipulation as surety for him. It is given for your benefit and for that of your principal together when he, for instance, commissions you to lend money at interest to a person who borrows it for your principal's benefit ; or where, on your wishing to sue him as surety for some one else, he commissions you to sue his principal, himself undertaking all

risk: or where, at his risk, you stipulate for payment from a person whom he substitutes for himself as your debtor. It 3 is given for the benefit of a third person when, for instance, some one commissions you to look after Titius's affairs as general agent, or to buy Titius a piece of land, or to go surety for him. It is for the benefit of the principal and a third 4 person when, for instance, some one instructs you to look after affairs common to himself and Titius, or to buy an estate for himself and Titius, or to go surety for them jointly. It 5 is for the benefit of yourself and a third person when, for instance, some one instructs you to lend money at interest to Titius; if it were to lend money free of interest, it would be for the benefit of the third person only. It is for your benefit 6 alone if, for instance, some one commissions you to invest your money in the purchase of land rather than to lend it at interest, or vice versa. But such a commission is not really so much a commission in the eye of the law as a mere piece of advice, and consequently will not give rise to an obligation, for the law holds no one responsible as on agency for mere advice given, even if it turns out ill for the person advised, for every one can find out for himself whether what he is advised to do is likely to turn out well or ill. Consequently, if you have money lying idle in your cash-box, and on so and so's advice buy something with it, or put it out at interest, you cannot sue that person by the action on agency, although your purchase or loan turns out a bad speculation; and it has even been questioned, on this principle, whether a man is suable on agency who commissions you to lend money to Titius; but the prevalent opinion is that of Sabinus, that so specific a recommendation is sufficient to support an action, because (without it) you would never have lent your money to Titius at all. So too instructions to commit an unlawful 7 or immoral act do not create a legal obligation—as if Titius were to instigate you to steal, or to do an injury to the property or person of some one else; and even if you act on his instructions, and have to pay a penalty in consequence, you cannot recover its amount from Titius.

An agent ought not to exceed the terms of his commission. 8 Thus, if some one commission you to purchase an estate for

him, but not to exceed the price of a hundred *aurei*, or to go surety for Titius up to that amount, you ought not in either transaction to exceed the sum specified: for otherwise you will not be able to sue him on the agency. Sabinus and Cassius even thought that in such a case you could not successfully sue him even for a hundred *aurei*, though the leaders of the opposite school differed from them, and the latter opinion is undoubtedly less harsh. If you buy the estate for less, you will have a right of action against him, for a direction to buy an estate for a hundred *aurei* is regarded as an implied direction to buy, if possible, for any smaller sum.

9 The authority given to an agent duly constituted can be annulled by revocation before he commences to act upon it.

10 Similarly, the death of either the principal or the agent before the latter commences to act extinguishes the agent's authority; but equity has so far modified this rule that if, after the death of a principal and without having notice of his decease, an agent executes his commission, he can sue on the agency: for otherwise the law would be penalizing a reasonable and unavoidable ignorance. Similar to this is the rule, that debtors who pay a manumitted steward, say, of Titius, without notice of his manumission, are discharged from liability, though by the strict letter of the law they are not discharged, because they have not paid the person whom

11 they were bound to pay. It is open to every one to decline a commission of agency, but acceptance must be followed by execution, or by a prompt resignation, in order to enable the principal to carry out his purpose either personally or by the appointment of another agent. Unless the resignation is made in such time that the principal can attain his object without suffering any prejudice, an action will lie at his suit, in default of proof by the agent that he could not resign before, or that his resignation, though inconvenient, was justifiable.

12 A commission of agency may be made to take effect from a specified future day, or may be subject to a condition.

13 Finally, it should be observed that unless the agent's services are gratuitous, the relation between him and the principal will not be agency proper, but some other kind of contract; for if a remuneration is fixed, the contract is one of hiring.

And generally we may say that in all cases where, supposing a man's services are gratuitous, there would be a contract of agency or deposit, there is held to be a contract of hiring if remuneration is agreed upon; consequently, if you give clothes to a fuller to clean or to finish, or to a tailor to mend, without agreeing upon or promising any remuneration, you can be sued by the action on agency.

TITLE XXVII

OF QUASI-CONTRACTUAL OBLIGATIONS

Having enumerated the different kinds of contracts, let us now examine those obligations also which do not originate, properly speaking, in contract, but which, as they do not arise from a delict, seem to be quasi-contractual. Thus, if one 1
man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under a legal obligation even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better. Guardians again, 2

who can be sued by the action on guardianship, cannot properly be said to be bound by contract, for there is no contract between guardian and ward: but their obligation, as it certainly does not originate in delict, may be said to be quasi-contractual. In this case too each party has a remedy against the other: not only can the ward sue the guardian directly on the guardianship, but the guardian can also sue the ward by the contrary action of the same name, if he has either incurred any outlay in managing the ward's property, or bound himself on his behalf, or pledged his own property as security for
3 the ward's creditors. Again, where persons own property jointly without being partners, by having, for instance, a joint bequest or gift made to them, and one of them is liable to be sued by the other in a partition suit because he alone has taken its fruits, or because the plaintiff has laid out money on it in necessary expenses: here the defendant cannot properly be said to be bound by contract, for there has been no contract made between the parties; but as his obligation is not based on delict, it may be said to be quasi-contractual.
4 The case is exactly the same between joint heirs, one of whom is liable to be sued by the other on one of these grounds in
5 an action for partition of the inheritance. So, too, the obligation of an heir to discharge legacies cannot properly be called contractual, for it cannot be said that the legatee has contracted at all with either the heir or the testator: yet, as the heir is not bound by a delict, his obligation would seem to
6 be quasi-contractual. Again, a person to whom money not owed is paid by mistake is thereby laid under a quasi-contractual obligation; an obligation, indeed, which is so far from being contractual, that, logically, it may be said to arise from the extinction rather than from the formation of a contract; for when a man pays over money, intending thereby to discharge a debt, his purpose is clearly to loose a bond by which he is already bound, not to bind himself by a fresh one. Still, the person to whom money is thus paid is laid under an obligation exactly as if he had taken a loan for consumption,
7 and therefore he is liable to a condiction. Under certain circumstances money which is not owed, and which is paid by mistake, is not recoverable; the rule of the older lawyers on

this point being that wherever a defendant's denial of his obligation is punished by duplication of the damages to be recovered—as in actions under the lex Aquilia, and for the recovery of a legacy—he cannot get the money back on this plea. The older lawyers, however, applied this rule only to such legacies of specific sums of money as were given by condemnation; but by our constitution, by which we have assimilated legacies and trust bequests, we have made this duplication of damages on denial an incident of all actions for their recovery, provided the legatee or beneficiary is a church, or other holy place honoured for its devotion to religion and piety. Such legacies, although paid when not due, cannot be reclaimed.

TITLE XXVIII

OF PERSONS THROUGH WHOM WE CAN ACQUIRE OBLIGATIONS

Having thus gone through the classes of contractual and quasi-contractual obligations, we must remark that rights can be acquired by you not only on your own contracts, but also on those of persons in your power—that is to say, your slaves and children. What is acquired by the contracts of your slaves becomes wholly yours; but the acquisitions of children in your power by obligations must be divided on the principle of ownership and usufruct laid down in our constitution: that is to say, of the material results of an action brought on an obligation made in favour of a son the father shall have the usufruct, though the ownership is reserved to the son himself: provided, of course, that the action is brought by the father, in accordance with the distinction drawn in our recent constitution. Freemen also, and the slaves of another person, acquire 1
for you if you possess them in good faith, but only in two cases, namely, when they acquire by their own labour, or in dealing with your property. A usufructuary or usuary slave 2
acquires under the same conditions for him who has the usufruct or use. It is settled law that a slave jointly owned 3
acquires for all his owners in the proportion of their property in him, unless he names one exclusively in a stipulation, or in the delivery of property to himself, in which case he acquires

for him alone; as in the stipulation 'do you promise to convey to Titius, my master?' If it was by the direction of one of his joint owners only that he entered into a stipulation, the effect was formerly doubted; but now it has been settled by our decision that (as is said above) under such circumstances he acquires for him only who gave him the order.

TITLE XXIX

OF THE MODES IN WHICH OBLIGATIONS ARE DISCHARGED

An obligation is always extinguished by performance of what is owed, or by performance of something else with the creditor's assent. It is immaterial from whom the performance proceeds—be it the debtor himself, or some one else on his behalf: for on performance by a third person the debtor is released, whether he knows of it or not, and even when it is against his will. Performance by the debtor releases, besides himself, his sureties, and conversely performance by a surety
1 releases, besides himself, the principal debtor. Acceptilation is another mode of extinguishing an obligation, and is, in its nature, an acknowledgement of a fictitious performance. For instance, if something is due to Titius under a verbal contract, and he wishes to release it, it can be done by his allowing the debtor to ask 'that which I promised thee hast thou received?' and by his replying 'I have received it'. An acceptilation can be made in Greek, provided the form corresponds to that of the Latin words, as ἔχεις λαβὼν δηνάρια τόσα; ἔχω λαβών. This process, as we said, discharges only obligations which arise from verbal contract, and no others, for it seemed only natural that where words can bind words may also loose: but a debt due from any other cause may be transformed into a debt by stipulation, and then released by an imaginary verbal payment or acceptilation. So, too, as a debt can be lawfully discharged
2 in part, so acceptilation may be made of part only. A stipulation has been invented, commonly called Aquilian, by which an obligation of any kind whatsoever can be clothed in stipulation form, and then extinguished by acceptilation; for by this process any kind of obligation may be novated. Its terms, as settled by Gallus Aquilius, are as follow: 'Whatever, and on whatsoever ground, you are or shall be compellable to

convey to or do for me, either now or on a future specified day, and for whatsoever I have or shall have against you an action personal or real, or any extraordinary remedy, and whatsoever of mine you hold or possess naturally or civilly, or would possess, or now fail to possess through some wilful fault of your own—as the value of each and all of these claims Aulus Agerius stipulated for the payment of such and such a sum, and payment was formally promised by Numerius Negidius.' Then conversely, Numerius Negidius asked Aulus Agerius, 'hast thou received the whole of what I have to-day engaged, by the Aquilian stipulation, to pay thee?' to which Aulus Agerius replied 'I have it, and account it received'. Novation 3
is another mode of extinguishing an obligation, and takes place when you owe Seius a sum, and he stipulates for payment thereof from Titius; for the intervention of a new person gives birth to a new obligation, and the first obligation is transformed into the second, and ceases to exist. Sometimes indeed the first stipulation is avoided by novation even though the second is of no effect: for instance, if you owe Titius a sum, and he stipulates for payment thereof from a pupil without his guardian's authority, he loses his claim altogether, for you, the original debtor, are discharged, and the second obligation is unenforceable. The same does not hold if one stipulate from a slave; for then the former debtor continues bound as fully as if one had stipulated from no one. But when the original debtor is the promisor, a second stipulation produces a novation only if it contains something new—if a condition, for instance, or a term, or a surety be added, or taken away—though, supposing the addition of a condition, we must be understood to mean that a novation is produced only if the condition is accomplished: if it fails, the prior obligation continues in force. Among the older lawyers it was an established rule, that a novation was effected only when it was with that intention that the parties entered into the second obligation; but as this still left it doubtful when the intention was present and when absent, various presumptions were established as to the matter by different persons in different cases. We therefore issued our constitution, enacting most clearly that no novation shall take place unless the contracting parties

expressly state their intention to be the extinction of the prior obligation, and that in default of such statement, the first obligation shall subsist, and have the second also added to it: the result being two obligations resting each on its own independent ground, as is prescribed by the constitution, and
4 as can be more fully ascertained by perusing the same. Moreover, those obligations which are contracted by consent alone are dissolved by a contrary agreement. For instance, if Titius and Seius agree that the latter shall buy an estate at Tusculum for a hundred *aurei*, and then before execution on either side by payment of the price or delivery of the estate they arrange to abandon the sale, they are both released. The case is the same with hire and the other contracts which are formed by consent alone.

BOOK IV

TITLE I

OF OBLIGATIONS ARISING FROM DELICT

HAVING treated in the preceding Book of contractual and quasi-contractual obligations, it remains to inquire into obligations arising from delict. The former, as we remarked in the proper place, are divided into four kinds; but of these latter there is but one kind, for, like obligations arising from real contracts, they all originate in some act, that is to say, in the delict itself, such as a theft, a robbery, wrongful damage, or an injury.

Theft is a fraudulent dealing with property, either in itself, 1
or in its use, or in its possession: an offence which is prohibited by natural law. The term *furtum*, or theft, is derived either 2
from *furvum*, meaning 'black', because it is effected secretly and under cover, and usually by night: or from *fraus*, or from *ferre*, meaning 'carrying off'; or from the Greek word φώρ, thief, which indeed is itself derived from φέρειν, to carry off. There are two kinds of theft, theft detected in the commission, 3
and simple theft: the possession of stolen goods discovered upon search, and the introduction of stolen goods, are not (as will appear below) so much specific kinds of theft as actionable circumstances connected with theft. A thief detected in the commission is termed by the Greeks ἐπ' αὐτοφώρῳ; in this kind is included not only he who is actually caught in the act of theft, but also he who is detected in the place where the theft is committed; for instance, one who steals from a house, and is caught before he has got outside the door; or who steals olives from an olive garden, or grapes from a vineyard, and is caught while still in the olive garden or vineyard. And the definition of theft detected in the commission must be even further extended, so as to include the thief who is caught or even seen with the stolen goods still in his hands, whether the place be public or private, and whether the person who sees

or catches him be the owner of the property, or some third person, provided he has not yet escaped to the place where he intended to take and deposit his booty: for if he once escapes there, it is not theft detected in the commission, even if he be found with the stolen goods upon him. What is simple theft is clear from what has been said: that is to say, it is all theft
4 which is not detected in the commission. The offence of discovery of stolen goods occurs when a person's premises are searched in the presence of witnesses, and the stolen property is found thereon; this makes him liable, even though innocent of theft, to a special action for receiving stolen goods. To introduce stolen goods is to pass them off to a man, on whose premises they are discovered, provided this be done with the intent that they shall be discovered on his premises rather than on those of the introducer. The man on whose premises they are found may sue the latter, though innocent of theft, in an action for the introduction of stolen goods. There is also an action for refusal of search, available against him who prevents another who wishes to look in the presence of witnesses for stolen property; and finally, by the action for non-production of stolen goods, a penalty is imposed by the praetor's edict on him who has failed to produce stolen property which is searched for and found on his premises. But the last-named actions, namely, those for receiving stolen goods, for introducing them, for refusal of search, and for non-production, have now become obsolete: for the search for such property is no longer made in the old fashion, and accordingly these actions went out of use also. It is obvious, however, that any one who knowingly receives and hides stolen property
5 may be sued by the action for simple theft. The penalty for theft detected in the commission is four times the value, and for simple theft twice the value, of the property stolen, whether the thief be a slave or a free person.

6 Theft is not confined to carrying away the property of another with intent of appropriation, but comprises also all corporeal dealing with the property of another against the will of the owner. Thus, for a pawnee to use the thing which he has in pawn, or to use a thing committed to one's keeping as a deposit, or to put a thing which is lent for use to a different

use than that for which it was lent, is theft; to borrow plate, for instance, on the representation that the borrower is going to entertain his friends, and then to carry it away into the country: or to borrow a horse for a drive, and then to take it out of the neighbourhood, or like the man in the old story, to take it into battle. With regard, however, to those persons 7 who put a thing lent for use to a different purpose than the lender contemplated, the rule is that they are guilty of theft only if they know it to be contrary to the will of the owner, and that if he had notice he would refuse permission; but if they believe that he would give permission, it is not theft: and the distinction is just, for there is no theft without unlawful intention. It is also said not to be theft if a man turns 8 a thing lent for use to a use other than he believes its owner would sanction, though in point of fact its owner is consenting. Whence arose the following question: if Titius solicits the slave of Maevius to steal property of the latter, and convey it to him, and the slave informs Maevius of it, who, wishing to detect Titius in the very act, allows the slave to convey the property to him; can an action of theft, or for corrupting the slave, or neither, be maintained against Titius? The case was submitted to us, and we examined the conflicting opinions of the earlier jurists on the matter: some of whom thought that neither action lay, and others, that Maevius might sue on theft only. But we, in order to put an end to such quibbles, have enacted by our decision that in such a case both the action on theft and that for corrupting a slave shall lie. It is true that the slave has not been corrupted by the advances made to him, so that the case does not come within the rules which introduced the action for such corruption: yet the would-be corrupter's intention was to make him dishonest, so that he is liable to a penal action, exactly as if the slave had actually been corrupted, lest his immunity from punishment should encourage others to perpetrate a similar wrong on a slave less strong to resist temptation. A free man too may be the 9 subject of a theft—for instance, a child in my power, if secretly removed from my control. So too a man some- 10 times steals his own property—for instance, a debtor who purloins the goods which he has pledged to a creditor.

11 Theft may be chargeable on a person who is not the perpetrator; on him, namely, by whose aid and abetment a theft is committed. Among such persons we may mention the man who knocks money out of your hand for another to pick up, or who stands in your way that another may snatch something from you, or scatters your sheep or your oxen, that another may steal them, like the man in the old books, who waved a red cloth to frighten a herd. If the same thing were done as a frolic, without the intention of assisting a theft, the proper action is not theft, but on the case. Where, however, Titius commits theft with the aid of Maevius, both are liable to an action on theft. A man, too, is held to have aided and abetted a theft who places a ladder under a window, or breaks open a window or a door, in order that another may steal, or who lends tools for the breaking of them open, or a ladder to place under a window, if he knows the object for which they are borrowed. It is clear that a man is not liable on theft, who, though he advises and instigates the offence, does
12 not actually aid in its commission. If a child in power, or a slave, steal property of his father or master, it is theft, and the property is deemed stolen, so that no one can acquire it by usucapion until it has returned into the hands of the owner; but no action will lie on the theft, because between a son in power and his father, or between a slave and his master, no action will lie on any ground whatsoever. But if the offender is aided and abetted by a third person, the latter is liable to an action on theft, because a theft has in fact been committed, and by his aid and abetment.

13 The action on theft will lie at the suit of any person interested in the security of the property, even though he be not its owner: indeed, even the owner cannot maintain
14 the action unless he suffers damage from the loss. Hence, when a pawn is stolen the pawnee can sue, even though his debtor be perfectly able to pay the debt; for it is more advantageous to him to rely on the pledge, than to bring a personal action: and this rule is so unbending that even the pawnor who steals a pawn is suable for theft by the pawnee.
15 So, if clothes are delivered to be cleaned or finished or mended for a certain remuneration, and then are stolen, it is the fuller

or tailor who can sue on the theft, and not the owner; for the owner suffers nothing by the loss, having the action of letting against the fuller or tailor for the recovery of his property. Similarly a purchaser in good faith, even though a good title as owner is not given to him, can bring the action of theft if the property is stolen, exactly like the pawnee. The action is, however, not maintainable at the suit of a fuller or tailor, unless he is solvent, that is to say, unless he is able to fully indemnify the owner; if he is insolvent, the owner cannot recover from him, and so can maintain an action against the thief, being, on this hypothesis, interested in the recovery of the property. Where the fuller or tailor is only partly instead of wholly solvent the rule is the same. The older 16
lawyers held that what has been said of the fuller and tailor applied also to the borrower for use, on the ground that as the remuneration which the fuller receives makes him responsible for custody, so the advantage which the borrower derives from the use requires him to keep it safely at his peril. Our wisdom, however, has amended the law in this particular in our decisions, by allowing the owner the option of suing either the borrower by action on the loan, or the thief by action of theft; though when his choice has been determined he cannot change his mind, and resort to the other action. If he prefers to sue the thief, the borrower is absolutely released from liability; but if he proceeds against the borrower, he cannot in any way himself sue the thief on the stealing, though this may be done by the borrower, who is defendant in the other action, provided that the owner knew, at the time when he began his action against the borrower, that the thing had been stolen. If he is ignorant of this, or even if he is merely doubtful whether the borrower still has the property in his possession or not, and sues him on the loan, he may, on subsequently learning the facts, and if he wishes to drop the action which he has commenced, and sue the thief instead, adopt this course, in which case no obstacle is to be thrown in his way, because it was in ignorance that he took action and sued the borrower on the loan. If, however, the owner has been indemnified by the borrower, in no case can he bring the action of theft against the thief, as

his rights of action pass to the person who has compensated him for the loss of his property. Conversely it is clear, that if, at the outset, the owner began an action on the loan against the borrower, not knowing that the property had been stolen, and subsequently, on learning this, proceeded against the thief instead, the borrower is absolutely released from liability, whatever may be the result of the owner's action against the thief; the rule being the same, whether the borrower be wholly
17 or only partially solvent. As a depositary is not answerable for the safe keeping of the thing deposited, but only for fraud, and, if it is stolen, is not compellable to make restitution by action of deposit, he has no interest if it is lost, and therefore the action of theft is maintainable only by the depositor.
18 Finally, it has been a question whether a child below the age of puberty, who carries away the property of another, is guilty of theft. The answer is that, as theft depends on intention, obligation by theft is not incurred unless the child is near
19 puberty, and so understands its delinquency. The object of the action on theft, whether it be for double or quadruple the value of the goods stolen, is merely the recovery of the penalty; to recover the goods themselves or their value the owner has an independent remedy by vindication or condiction. The former is the proper remedy when it is known who is in possession of the goods, whether this be the thief or any one else: the latter lies against the thief or his heir, whether in possession of the stolen property or not.

TITLE II

OF ROBBERY

Robbery is chargeable also as theft; for who deals with the property of another more against that other's will than the robber? And thus the description of the robber as an audacious thief is a good one. However, as a special remedy for this offence the praetor has introduced the action for robbery, or rapine with violence, which may be brought within a year for four times the value, after a year for simple damages, and which lies even when only a single thing of the slightest value has been taken with violence. This fourfold value, however, is not all penalty, nor is there an independent

action for the recovery of the property or its value, as we observed was the case in the action of theft detected in the commission; but the thing or its value is included in the fourfold, so that, in point of fact, the penalty is three times the value of the property, and this whether the robber be taken in the act or not; for it would be absurd to treat a robber more lightly than one who carries off property merely secretly. This action is maintainable only where the robbery is attended 1
with wrongful intention; consequently, if a man by mistake thought that property was his own, and, in his ignorance of law, forcibly carried it off in the belief that it was lawful for an owner to take away, even by force, a thing belonging to himself from a person in whose possession it was, he cannot be held liable to this action; and similarly on principle he would not in such a case be suable for theft. Lest, however, robbers, under the cloak of such a plea, should discover a method of gratifying a grasping habit with impunity, the law has been amended upon this point by imperial constitutions, by which it is enacted that it shall not be lawful for any one to forcibly carry off movable property, inanimate or animate, even though he believe it to belong to him; and that whosoever disobeys this shall forfeit the property, if, in fact, it be his, and if it be not, shall restore it, and along with it its value in money. And by the said constitutions it is also declared that this provision relates not only to movables (of which alone robbery can be committed), but also to forcible entries on land and houses, so as to deter men from all violent seizing upon property whatsoever under the cloak of such excuses. In 2
order to support this action it is not necessary that the goods of which robbery has been committed should belong to the plaintiff, provided they were taken from among his property. Thus, if a thing be let, or lent, or pledged to Titius, or even deposited with him under such circumstances that he has an interest in its not being carried off—for instance, by his having undertaken the entire responsibility for its safe custody;—or if he possesses it in good faith, or has a usufruct or any other right in it whereby he suffers loss or incurs liability through its being forcibly taken from him, the action will be maintainable by him; not necessarily in order to restore to him the

ownership, but only to compensate him for what it is alleged he has lost by its being taken from his goods or withdrawn from his means. In fact, it may be said generally that where, supposing property to be taken secretly, the action of theft will lie, the action on robbery will lie at suit of the same person, if it be taken with violence.

TITLE III

OF THE LEX AQUILIA

Unlawful damage is actionable under the lex Aquilia, whose first chapter provides that if a slave of another man, or a quadruped from his flocks or herds, be unlawfully killed, the offender shall pay to the owner whatever was the highest value thereof
1 within the year next immediately preceding. From the fact that this enactment does not speak of quadrupeds simply, but only of such quadrupeds as are usually included under the idea of flocks and herds, it is to be inferred that it has no application to wild animals or to dogs, but only to such beasts as can properly be said to graze in herds, namely horses, mules, asses, oxen, sheep, and goats. It is settled, too, that swine come under its operation, for they are comprehended in 'herds' because they feed in this manner; thus Homer in his Odyssey, as quoted by Aelius Marcianus in his Institutes, says, 'You will find him sitting among his swine, and they are feeding by the
2 Rock of Corax, over against the spring Arethusa.'[1] To kill unlawfully is to kill without any right; thus a man who kills a robber is not liable to this action, if he could in no other way
3 escape the danger by which he was threatened. So, too, where one man kills another by misadventure, he is not liable under this statute, provided there is no fault or carelessness on his part; otherwise it is different, for under this statute care-
4 lessness is as punishable as wilful wrong-doing. Accordingly, if a man, while playing or practising with javelins, runs your slave through as he passes by, a distinction is drawn. If it be done by a soldier in his exercising ground, that is to say, where such practice is usually conducted, he is in no way to blame; but if it be done by some one else, his carelessness will make him liable; and so it is with the soldier, if he do it in

[1] Od. xiii. 407, 8.

some place other than that appropriated to military exercises. So, too, if a man is trimming a tree, and kills your slave as he 5
passes by with a bough which he lets fall, he is guilty of negligence, if it is near a public way, or a private path belonging to a neighbour, and he does not call out to give people warning; but if he calls out, and the slave takes no pains to get out of the way, he is not to blame. Nor would such a man be liable, if he was cutting a tree far away from a road, or in the middle of a field, even if he did not call out; for strangers had no business to be there. Again, if a surgeon 6
operates on your slave, and then neglects altogether to attend to his cure, so that the slave dies in consequence, he is liable for his carelessness. Sometimes, too, unskilfulness is undis- 7
tinguishable from carelessness—as where a surgeon kills your slave by operating upon him unskilfully, or by giving him wrong medicines; and similarly, if your slave is run over by 8
a team of mules, which the driver has not enough skill to hold, the latter is suable for carelessness; and the case is the same if he was simply not strong enough to hold them, provided they could have been held by a stronger man. The rule also applies to runaway horses, if the running away is due to the rider's deficiency either in skill or in strength. The meaning 9
of the words of the statute 'whatever was the highest value thereof within the year' is that if any one, for instance, kills a slave of yours, who at the moment of his death is lame, or maimed, or blind of one eye, but within the year was sound and worth a price, the person who kills him is answerable not merely for his value at the time of his death, but for his highest value within the year. It is owing to this that the action under this statute is deemed to be penal, because a defendant is sometimes bound to pay a sum not merely equivalent to the damage he has done, but far in excess of it; and consequently, the right of suing under the statute does not pass against the heir, though it would have done so if the damages awarded had never exceeded the actual loss sustained by the plaintiff. By juristic construction of the statute, 10
though not so enacted in its terms, it has been settled that one must not only take account, in the way we have described, of the value of the body of the slave or animal killed, but must

also consider all other loss which indirectly falls upon the plaintiff through the killing. For instance, if your slave has been instituted somebody's heir, and, before he has by your order accepted, he is slain, the value of the inheritance you have missed must be taken into consideration; and so, too, if one of a pair of mules, or one of four chariot horses, or one of a company of slave players is killed, account is to be taken not only of what is killed, but also of the extent to which the
11 others have been depreciated. The owner whose slave is killed has the option of suing the wrongdoer for damages in a private action under the lex Aquilia, or of accusing him on a capital charge by indictment.

12 The second chapter of the lex Aquilia is now obsolete; the
13 third makes provision for all damage which is not covered by the first. Accordingly, if a slave, or some quadruped which comes within its terms, is wounded, or if a quadruped which does not come within its terms, such as a dog or wild animal, is wounded or killed, an action is provided by this chapter; and if any other animal or inanimate thing is unlawfully damaged, a remedy is herein afforded; for all burning, breaking, and crushing is hereby made actionable, though, indeed, the single word 'breaking' covers all these offences, denoting as it does every kind of injury, so that not only crushing and burning, but any cutting, bruising, spilling, destroying, or deteriorating is hereby denominated. Finally, it has been decided that if one man mixes something with another's wine or oil, so as to spoil its natural goodness, he is liable under this
14 chapter of the statute. It is obvious that, as a man is liable under the first chapter only where a slave or quadruped is killed by express design or through negligence on his part, so, too, he is answerable for all other damage under this chapter only where it results from some wilful act or carelessness of his. Under this chapter, however, it is not the highest value which the thing had within a year, but that which it had within the last thirty days, which is chargeable on the author
15 of the mischief. It is true that here the statute does not expressly say 'the *highest* value', but Sabinus rightly held that the damages must be assessed as if the words 'highest value' occurred also in this chapter; the Roman people, who enacted

this statute on the proposal of Aquilius the tribune, having thought it sufficient to use them in the first chapter only.

It is held that a direct action lies under this statute only 16
when the body of the offender is substantially the instrument of mischief. If a man occasions loss to another in any other way, a modified action will usually lie against him; for instance, if he shuts up another man's slave or quadruped, so as to starve him or it to death, or drives his horse so hard as to knock him to pieces, or drives his cattle over a precipice, or persuades his slave to climb a tree or go down a well, who, in climbing the one or going down the other, is killed or injured in any part of his body, a modified action is in all these cases given against him. But if a slave is pushed off a bridge or bank into a river, and there drowned, it is clear from the facts that the damage is substantially done by the body of the offender, who is consequently liable directly under the lex Aquilia. If damage be done, not by the body or to a body, but in some other form, neither the direct nor the modified Aquilian action will lie, though it is held that the wrongdoer is liable to an action on the case; as, for instance, where a man is moved by pity to loose another's slave from his fetters, and so enables him to escape.

TITLE IV

OF INJURIES

By injury, in a general sense, is meant anything which is done without any right. Besides this, it has three special significations; for sometimes it is used to express outrage, the proper word for which—contumely—is derived from the verb 'to contemn', and so is equivalent to the Greek ὕβρις: sometimes it means culpable negligence, as where damage is said to be done (as in the lex Aquilia) 'with injury', where it is equivalent to the Greek ἀδίκημα; and sometimes iniquity and injustice, which the Greeks express by ἀδικία; thus a litigant is said to have received an 'injury' when the praetor or judge delivers an unjust judgement against him. An injury or out- 1
rage is inflicted not only by striking with the fist, a stick, or a whip, but also by vituperation for the purpose of collecting a crowd, or by taking possession of a man's effects on the

ground that he was in one's debt ; or by writing, composing, or publishing defamatory prose or verse, or contriving the doing of any of these things by some one else ; or by constantly following a matron, or a young boy or girl below the age of puberty, or attempting anybody's chastity ; and, in
2 a word, by innumerable other acts. An outrage or injury may be suffered either in one's own person, or in the person of a child in one's power, or even, as now is generally allowed, in that of one's wife. Accordingly, if you commit an 'outrage' on a woman who is married to Titius, you can be sued not only in her own name, but also in those of her father, if she be in his power, and of her husband. But if, conversely, it be the husband who is outraged, the wife cannot sue ; for wives should be protected by their husbands, not husbands by their wives. Finally, a father-in-law may sue on an outrage committed on his daughter-in-law, if the son to whom she is married is in
3 his power. Slaves cannot be outraged themselves, but their master may be outraged in their person, though not by all the acts by which an outrage might be offered to him in the person of a child or wife, but only by aggravated assaults or such insulting acts as clearly tend to dishonour the master himself : for instance, by flogging the slave, for which an action lies ; but for mere verbal abuse of a slave, or for
4 striking him with the fist, the master cannot sue. If an outrage is committed on a slave owned by two or more persons jointly, the damages to be paid to these severally should be assessed with reference not to the shares in which they own him, but to their rank or position, as it is to the reputation
5 and not to property that the injury is done ; and if an outrage is committed on a slave belonging to Maevius, but in whom Titius has a usufruct, the injury is deemed to be done to the
6 former rather than to the latter. But if the person outraged is a free man who believes himself to be your slave, you have no action unless the object of the outrage was to bring you into contempt, though he can sue in his own name. The principle is the same when another man's slave believes himself to belong to you ; you can sue on an outrage committed on him only when its object is to bring contempt on you.

7 The penalty prescribed for outrage in the Twelve Tables

was, for a limb disabled, retaliation, for a bone merely broken a pecuniary mulct proportionate to the great poverty of the age. The praetors, however, subsequently allowed the person outraged to put his own estimate on the wrong, the judge having a discretion to condemn the defendant either in the sum so named by the plaintiff, or in a less amount; and of these two kinds of penalties that fixed by the Twelve Tables is now obsolete, while that introduced by the praetors, which is also called 'honorary', is most usual in the actual practice of the courts. Thus the pecuniary compensation awarded for an outrage rises and falls in amount according to the rank and character of the plaintiff, and this principle is not improperly followed even where it is a slave who is outraged; the penalty where the slave is a steward being different from what it is when he is an ordinary menial, and different again when he is condemned to wear fetters. The lex Cornelia 8
also contains provisions as to outrages, and introduced an action on outrage, available to a plaintiff who alleges that he has been struck or beaten, or that a forcible entry has been made upon his house; the term 'his house' including not only one which belongs to him and in which he lives, but also one which is hired by him, or in which he is received gratuitously as a guest. An outrage becomes 'aggravated' either 9
from the atrocious character of the act, as where a man is wounded or beaten with clubs by another; or from the place where it is committed, for instance, in the theatre or forum, or in full sight of the praetor; or from the rank of the person outraged,—if it be a magistrate, for instance, or if a senator be outraged by a person of low condition, or a parent by his child, or a patron by his freedman; for such an injury done to a senator, a parent, or a patron has a higher pecuniary compensation awarded for it than one done to a mere stranger, or to a person of low condition. Sometimes too the position of the wound makes an outrage aggravated, as where a man is struck in the eye. Whether the person on whom such an outrage is inflicted is independent or in the power of another is almost entirely immaterial, it being considered aggravated in either case. Finally, it should be observed that a person 10
who has been outraged always has his option between the

civil remedy and a criminal indictment. If he prefers the former, the penalty which is imposed depends, as we have said, on the plaintiff's own estimate of the wrong he has suffered; if the latter, it is the judge's duty to inflict an extraordinary penalty on the offender. It should be remembered, however, that by a constitution of Zeno persons of illustrious or still higher rank may bring or defend such criminal actions on outrage by an agent, provided they comply with the requirements of the constitution, as may be more clearly as-
11 certained by a perusal of the same. Liability to an action on outrage attaches not only to him who commits the act,—the striking of a blow, for instance—but also to those who maliciously counsel or abet in the commission, as, for in-
12 stance, to a man who gets another struck in the face. The right of action on outrage is lost by condonation; thus, if a man be outraged, and takes no steps to obtain redress, but at once lets the matter, as it is said, slip out of his mind, he cannot subsequently alter his intentions, and resuscitate an affront which he has once allowed to rest.

TITLE V

OF QUASI-DELICTAL OBLIGATIONS

The obligation incurred by a judge who delivers an unjust or partial decision cannot properly be called delictal, and yet it does not arise from contract; consequently, as he cannot but be held to have done a wrong, even though it may be due to ignorance, his liability would seem to be quasi-delictal, and a pecuniary penalty will be imposed on him at
1 the judge's discretion. Another case of quasi-delictal obligation is that of a person from whose residence, whether it be his own, or rented, or gratuitously lent him, anything is thrown or poured out whereby another is injured; the reason why his liability cannot properly be called delictal being that it is usually incurred through the fault of some other person, such as a slave or a freedman. Of a similar character is the obligation of one who keeps something placed or hung over a public way, which might fall and injure any one. In this last case the penalty has been fixed at ten *aurei*; in that of things thrown or poured out of a dwelling-house the action

is for damages equivalent to double the loss sustained, though if a free man be thereby killed the penalty is fixed at fifty *aurei*, and even if he be merely injured he can sue for such damages as the judge shall in his discretion award; and here the latter should take into account the medical and other expenses of the plaintiff's illness, as well as the loss which he has sustained through being disabled from work. If a son in power 2
lives apart from his father, and anything is thrown or poured out of his place of residence, or if he has anything so placed or hung as to be dangerous to the public, it is the opinion of Julian that no action lies against the father, but that the son should be made sole defendant; and the same principle should be applied to a son in power who is made a judge, and delivers an unjust or partial decision. Similarly ship-owners, inn and 3
stable keepers are liable as on a quasi-delict for wilful damage or theft committed in their ships, inns, or stables, provided the act be done by some or one of their servants there employed, and not by themselves; for the action which is given in such cases is not based on contract, and yet as they are in some sense in fault for employing careless or dishonest servants, their liability would seem to be quasi-delictal. In such circumstances the action which is given is on the case, and lies at suit of the injured person's heir, though not against the heir of the ship-owner, inn or stable keeper.

TITLE VI

OF ACTIONS

The subject of actions still remains for discussion. An action is nothing else than the right of suing before a judge for what is due to one.

The leading division of all actions whatsoever, whether 1
tried before a judge or a referee, is into two kinds, real and personal; that is to say, the defendant is either under a contractual or delictal obligation to the plaintiff, in which case the action is personal, and the plaintiff's contention is that the defendant ought to convey something to, or do something for him, or of a similar nature; or else, though there is no legal obligation between the parties, the plaintiff asserts a ground of action against some one else relating to some thing,

in which case the action is real. Thus, a man may be in possession of some corporeal thing, in which Titius claims a right of property, and which the possessor affirms belongs to him; here, if Titius sues for its recovery, the action is real.
2 It is real also if a man asserts that he has a right of usufruct over a landed estate or a house, or a right of going or driving cattle over his neighbour's land, or of drawing water from the same; and so too are the actions relating to urban servitudes, as, for instance, where a man asserts a right to raise his house, to have an uninterrupted prospect, to project some building over his neighbour's land, or to rest the beams of his own house in his neighbour's wall. Conversely, there are actions relating to usufructs, and to rustic and urban servitudes, of a contrary import, which lie at the suit of plaintiffs who deny their opponent's right of usufruct, of going or driving cattle, of drawing water, of raising their house, of having an uninterrupted view, of projecting some building over the plaintiff's land, or of resting the beams of their house in the plaintiff's wall. These actions too are real, but negative, and never occur in disputes as to corporeal things, in which the plaintiff is always the party out of possession; and there is no action by which the possessor can (as plaintiff) deny that the thing in question belongs to his adversary, except in one case only, as to which all requisite information can be gathered from the
3 fuller books of the Digest. The actions which have hitherto been mentioned, and others which resemble them, are either of statutory origin, or at any rate belong to the civil law. There are other actions, however, both real and personal, which the praetor has introduced in virtue of his jurisdiction, and of which it is necessary to give examples. For instance, he will usually, under the circumstances to be mentioned, allow a real action to be brought with a fictitious allegation—namely, that the plaintiff has acquired a title by usucapion where this, in fact, is not the case; or, conversely, he will allow a fictitious plea on the part of the defendant, to the effect that the plaintiff has not acquired such title where, in point of
4 fact, he has. Thus, if possession of some object be delivered on a ground sufficient to legally transfer the same—for instance, under a sale or gift, as part of a dowry, or as a legacy

—and the transferee has not yet acquired a complete title by usucapion, he has no direct real action for its recovery, if he accidentally loses possession, because by the civil law a real action lies at the suit of the owner only. But as it seemed hard that in such a case there should be no remedy, the praetor introduced an action in which the plaintiff, who has lost possession, fictitiously alleges that he has acquired a full title by usucapion, and thus claims the thing as his own. This is called the Publician action, because it was first placed in the Edict by a praetor called Publicius. Conversely, if a 5
person, while absent in the service of the State, or while in the power of an enemy, acquires by usucapion property belonging to some one resident at home, the latter is allowed, within a year from the cessation of the possessor's public employment, to sue for a recovery of the property by a rescission of the usucapion: by fictitiously alleging, in other words, that the defendant has not thus acquired it; and the praetor from motives of equity allows this kind of action to be brought in certain other cases, as to which information may be gathered from the larger work of the Digest or Pandects. Similarly, 6
if a person conveys away his property in fraud of creditors, the latter, on obtaining from the governor of the province a decree vesting in them possession of the debtor's estate, are allowed to avoid the conveyance, and sue for the recovery of the property; in other words, to allege that the conveyance has never taken place, and that the property consequently still belongs to the debtor. Again, the Servian and quasi- 7
Servian actions, the latter of which is also called 'hypothecary', are derived merely from the praetor's jurisdiction. The Servian action is that by which a landlord sues for his tenant's property, over which he has a right in the nature of mortgage as security for his rent; the quasi-Servian is a similar remedy, open to every pledgee or hypothecary creditor. So far then as this action is concerned, there is no difference between a pledge and a hypothec: and indeed whenever a debtor and a creditor agree that certain property of the former shall be the latter's security for his debt, the transaction is called a pledge or a hypothec indifferently. In other points, however, there is a distinction between them; for the term 'pledge' is

properly used only where possession of the property in question is delivered to the creditor, especially if that property be movable: while a hypothec is, strictly speaking, such a right created by mere agreement without delivery of possession.
8 Besides these, there are also personal actions which the praetor has introduced in virtue of his jurisdiction, for instance, that brought to enforce payment of money already owed, and the action on a banker's acceptance, which closely resembled it. By our constitution, however, the first of these actions has been endowed with all the advantages which belonged to the second, and the latter, as superfluous, has therefore been deprived of all force and expunged from our legislation. To the praetor is due also the action claiming an account of the *peculium* of a slave or child in power, that in which the issue
9 is whether a plaintiff has made oath, and many others. The action brought to enforce payment of money already owed is the proper remedy against a person who, by a mere promise, without stipulation, has engaged to discharge a debt due either from himself or from some third party. If he has
10 promised by stipulation, he is liable by the civil law. The action claiming an account of a *peculium* is a remedy introduced by the praetor against a master or a father. By strict law, such persons incur no liability on the contracts of their slaves or children in power; yet it is only equitable that damages should be recoverable against them to the extent of the *peculium*, in which children in power and slaves have a
11 sort of property. Again, if a plaintiff, on being challenged by the defendant, deposes on oath that the latter owes him the money which is the object of the action, and payment is not made to him, the praetor most justly grants to him an action in which the issue is, not whether the money is owing,
12 but whether the plaintiff has sworn to the debt. There is also a considerable number of penal actions which the praetor has introduced in the exercise of his jurisdiction; for instance, against those who in any way injure or deface his album; or who summon a parent or patron without magisterial sanction; or who violently rescue persons summoned before himself, or who compass such a rescue; and others innumerable.
13 'Prejudicial' actions would seem to be real, and may be

exemplified by those in which it is inquired whether a man is free born, or has become free by manumission, or in which the question relates to a child's paternity. Of these the first alone belongs to the civil law: the others are derived from the praetor's jurisdiction. The kinds of actions having been 14
thus distinguished, it is clear that a plaintiff cannot demand his property from another in the form 'if it be proved that the defendant is bound to convey'. It cannot be said that what already belongs to the plaintiff ought to be conveyed to him, for conveyance transfers ownership, and what is his cannot be made more his than it is already. Yet for the prevention of theft, and multiplication of remedies against the thief, it has been provided that, besides the penalty of twice or four times the value of the property stolen, the property itself, or its value, may be recovered from the thief by a personal action in the form 'if it be proved that the defendant ought to convey', as an alternative for the real action which is also available to the plaintiff, and in which he asserts his ownership of the stolen property. We call a real action a 15
'vindication', and a personal action, in which the contention is that some property should be conveyed to us, or some service performed for us, a 'condiction', this term being derived from *condicere*, which has an old meaning of 'giving notice'. To call a personal action, in which the plaintiff contends that the defendant ought to convey to him, a condiction, is in reality an abuse of the term, for nowadays there is no such notice as was given in the old action of that name.

Actions may next be divided into those which are purely 16
reparative, those which are purely penal, and those which are mixed, or partly reparative, partly penal. All real 17
actions are purely reparative. Of personal actions those which spring from contract are nearly all of the same character; for instance, the actions on loans of money, or stipulations, on loans for use, on deposit, agency, partnership, sale, and hire. If, however, the action be on a deposit occasioned by a riot, a fire, the fall of a building, or a shipwreck, the praetor enables the depositor to recover double damages, provided he sues the bailee in person; he cannot recover double damages from the bailee's heir, unless he can prove

personal fraud against the latter. In these two cases the
18 action, though on contract, is mixed. Actions arising from delict are sometimes purely penal, sometimes are partly penal and partly reparative, and consequently mixed. The sole object of the action of theft is the recovery of a penalty, whether that penalty be four times the value of the property stolen, as in theft detected in the commission, or only twice that value, as in simple theft. The property itself is recoverable by an independent action in which the person from whom it has been stolen claims it as his own, whether it be in the possession of the thief himself or of some third person; and against the thief himself he may even bring a condiction, to
19 recover the property or its value. The action on robbery is mixed, for the damages recoverable thereunder are four times the value of the property taken, three-fourths being pure penalty, and the remaining fourth compensation for the loss which the plaintiff has sustained. So too the action on unlawful damage under the lex Aquilia is mixed, not only where the defendant denies his liability, and so is sued for double damages, but also sometimes where the claim is for simple damages only; as where a lame or one-eyed slave is killed, who within the year previous was sound and of large value; in which case the defendant is condemned to pay his greatest value within the year, according to the distinction which has been drawn above. Persons too who are under an obligation as heirs to pay legacies or trust bequests to our holy churches or other venerable places, and neglect to do so until sued by the legatee, are liable to a mixed action, by which they are compelled to give the thing or pay the money left by the deceased, and, in addition, an equivalent thing or sum as penalty, the condemnation being thus in twice the value of the original claim.

20 Some actions are mixed in a different sense, being partly real, partly personal. They are exemplified by the action for the division of a 'family', by which one of two or more joint heirs can enforce against the other or rest a partition of the inheritance, and by the actions for the division of common property, and for rectification of boundaries between adjoining landed proprietors. In these three actions the judge has

power, according as shall to him seem fair and equitable, to adjudge any part of the joint property, or of the land in dispute, to any one of the parties, and to order any one of them who seems to have an undue advantage in the partition or rectification to pay a certain sum of money to the other or the rest as compensation. The damages recoverable in an 21
action may be either once, twice, three, or four times the value of the plaintiff's original interest; there is no action by which more than fourfold damages can be claimed. Single 22
damages only are recoverable in the actions on stipulation, loan for consumption, sale, hire, agency, and many others besides. Actions claiming double damages are exemplified 23
by those on simple theft, on unlawful damage under the lex Aquilia, on certain kinds of deposit, and for corruption of a slave, which lies against any one by whose instigation and advice another man's slave runs away, or becomes disobedient to his master, or takes to dissolute habits, or becomes worse in any way whatsoever, and in which the value of property which the runaway slave has carried off is taken into account. Finally, as we remarked above, the action for the recovery of legacies left to places of religion is of this character. An 24
action for triple damages is grounded when a plaintiff makes an overstatement of his claim in the writ of summons, in consequence of which the officers of the court take too large a fee from the defendant. In such a case the latter will be able to recover from the plaintiff three times the loss which he sustains by the overcharge, including in these damages simple compensation for the sum paid in excess of the proper fee. This is provided by a distinguished constitution in our Code, under which a statutory condiction clearly lies for the damages in question. Quadruple damages are recoverable by the 25
action on theft detected in the commission, by the action on intimidation, and by the action grounded on the giving of money in order to induce one man to bring a vexatious suit against another, or to desist from a suit when brought. Under our constitution too a statutory condiction lies for the recovery of fourfold damages from officers of the court, who exact money from defendants in excess of its provisions. There is this difference between the actions on simple theft 26

and for the corruption of a slave, and the other of which we spoke in connexion with them, that by the two former double damages are recoverable under any circumstances ; the latter, namely the action on unlawful damage under the lex Aquilia, and that on certain kinds of deposit, entail double damages on the defendant only if he denies his liability ; if he admits it, simple damages alone can be recovered. The damages are double under an action for recovery of legacies left to religious places not only when the liability is denied, but also when the defendant delays payment until sued by the order of a magistrate ; if he admits his liability, and pays before being so sued, he cannot be compelled to pay more than the
27 original debt. The action on intimidation also differs from the others which we mentioned in the same connexion, in that it contains in its very nature an implied condition that the defendant is entitled to acquittal if, on being so ordered by the judge, he restores to the plaintiff the property of which the latter has been deprived. In other actions of the same class this is not so ; for instance, in the action on theft detected in the commission, the defendant has under any
28 circumstances to pay fourfold damages. Again, some actions are equitable, others are actions of strict law. To the former class belong the actions on sale, hire, unauthorized agency, agency proper, deposit, partnership, guardianship, loan for use, mortgage, division of a 'family', partition of joint property, those on the innominate contracts of sale by commission and exchange, and the suit for recovery of an inheritance. Until quite recently it was a moot point whether the last-named was properly an equitable action, but our constitution
29 has definitely decided the question in the affirmative. Formerly too the action for the recovery of a dowry was an equitable action : but as we found that the action on stipulation was more convenient, we have, while establishing many distinctions, attached all the advantages which the former remedy possessed to the action on stipulation, when employed for the recovery of a dowry. The former action being thus by a judicious reform abolished, that on stipulation, by which it has been replaced, has deservedly been invested with all the characteristics of an equitable action, so far as and whenever

it is brought for the recovery of a dowry. We have also given persons entitled to sue for such recovery a tacit hypothec over the husband's property, but this right is not to give any priority over other hypothecary creditors except where it is the wife herself who sues to recover her dowry; it being in her interest only that we have made this new provision. In 30
equitable actions the judge has full power to assess on good and fair grounds the amount due to the plaintiff, and in so doing to take into account counterclaims of the defendant, condemning the latter only in the balance. Even in actions of strict law counterclaims have been permitted since a rescript of the Emperor Marcus, the defendant meeting the plaintiff's claim by a plea of fraud. By our constitution, however, a wider field has been given to the principle of set-off, when the counterclaim is clearly established, the amount claimed in the plaintiff's action, whether real or personal, or whatever its nature, being reduced by operation of law to the extent of the defendant's counterclaim. The only exception to this rule is the action on deposit, against which we have deemed it no less than dishonest to allow any counterclaim to be set up; for if this were permitted persons might be fraudulently prevented from recovering property deposited under the pretence of a set-off. There are some actions again which 31
we call arbitrary, because their issue depends on an '*arbitrium*' or order of the judge. Here, unless on such order the defendant satisfies the plaintiff's claim by restoring or producing the property, or by performing his obligation, or in a noxal action by surrendering the guilty slave, he ought to be condemned. Some of such actions are real, others personal. The former are exemplified by the Publician action, the Servian action for the recovery of a tenant farmer's stock, and the quasi-Servian or so-called hypothecary action; the latter by the actions on intimidation and on fraud, by that for the recovery of a thing promised at a particular place, and by the action claiming production of property. In all these actions, and others of a similar nature, the judge has full power to determine on good and just grounds, according to the circumstances of each particular case, the form in which reparation ought to be made to the plaintiff.

32 It is the judge's duty, in delivering judgement, to make his award as definite as is possible, whether it relate to the payment of money or the delivery of property, and this even when the plaintiff's claim is altogether unliquidated.

33 Formerly, if the plaintiff, in his statement of claim, demanded more than he was entitled to, his case fell to the ground, that is, he lost even that which was his due, and in such cases the praetor usually declined to restore him to his previous position, unless he was a minor; for in this matter too the general rule was observed of giving relief to minors after inquiry made, if it were proved that they had made an error owing to their lack of years. If, however, the mistake was entirely justifiable, and such as to have possibly misled even the discreetest of men, relief was afforded even to persons of full age, as in the case of a man who sues for the whole of a legacy, of which part is found to have been taken away by codicils subsequently discovered; or where such subsequently discovered codicils give legacies to other persons, so that, the total amount given in legacies being reduced under the lex Falcidia, the first legatee is found to have claimed more than the three-fourths allowed by that statute. Over-statement of claim takes four forms; that is, it may relate either to the object, the time, the place, or the specification. A plaintiff makes an over-claim in the object when, for instance, he sues for twenty *aurei* while only ten are owing to him, or when, being only part owner of property, he sues to recover the whole or a greater portion of it than he is entitled to. Over-claim in respect of time occurs when a man sues for money before the day fixed for payment, or before the fulfilment of a condition on which payment was dependent; for exactly as one who pays money only after it falls due is held to pay less than his just debt, so one who makes his demand prematurely is held to make an over-claim. Over-claim in respect of place is exemplified by a man suing at one place for performance of a promise which it was expressly agreed was to be performed at another, without any reference, in his claim, to the latter: as, for instance, if a man, after stipulating thus, 'Do you promise to pay at Ephesus?' were to claim the money as due at Rome, without any addition as to Ephesus. This is an over-claim,

because by alleging that the money is due at Rome simply, the plaintiff deprives his debtor of the advantage he might have derived from paying at Ephesus. On this account an arbitrary action is given to a plaintiff who sues at a place other than that agreed upon for payment, in which the advantage which the debtor might have had in paying at the latter is taken into consideration, and which usually is greatest in connexion with commodities which vary in price from district to district, such as wine, oil, or grain; indeed even the interest on loans of money is different in different places. If, however, a plaintiff sues at Ephesus—that is, in our example, at the place agreed upon for the payment—he need do no more than simply allege the debt, as the praetor too points out, because the debtor has all the advantage which payment in that particular place gives him. Over-claim in respect of specification closely resembles over-claim in respect of place, and may be exemplified by a man's stipulating from you 'do you promise to convey Stichus or ten *aurei*?' and then suing for the one or the other—that is to say, either for the slave only, or for the money only. The reason why this is an over-claim is that in stipulations of this sort it is the promisor who has the election, and who may give the slave or the money, whichever he prefers; consequently if the promisee sues, alleging that either the money alone, or the slave alone, ought to be conveyed to him, he deprives his adversary of his election, and thereby puts him in a worse position, while he himself acquires an undue advantage. Other cases of this form of over-claim occur where a man, having stipulated in general terms for a slave, for wine, or for purple, sues for the particular slave Stichus, or for the particular wine of Campania, or for Tyrian purple; for in all of these instances he deprives his adversary of his election, who was entitled, under the terms of the stipulation, to discharge his obligation in a mode other than that which is required of him. And even though the specific thing for which the promisee sues be of little or no value, it is still an over-claim: for it is often easier for a debtor to pay what is of greater value than what is actually demanded of him. Such were the rules of the older law, which, however, has been made more liberal by our own and Zeno's statutes. Where the

over-claim relates to time, the constitution of Zeno prescribes the proper procedure; if it relates to quantity, or assumes any other form, the plaintiff, as we have remarked above, is to be condemned in a sum equivalent to three times any loss which
34 the defendant may have sustained thereby. If the plaintiff in his statement of claim demands less than is his due, as for instance by alleging a debt of five *aurei*, when in fact he is owed ten, or by claiming only half of an estate the whole of which really belongs to him, he runs no risk thereby, for, by the constitution of Zeno of sacred memory, the judge will in the same action condemn the defendant in the residue as well
35 as in the amount actually claimed. If he demands the wrong thing in his statement of claim, the rule is that he runs no risk; for if he discovers his mistake, we allow him to set it right in the same action. For instance, a plaintiff who is entitled to the slave Stichus may claim Eros; or he may allege that he is entitled to a conveyance under a will, when his right is founded in reality upon a stipulation.

36 There are again some actions in which we do not always recover the whole of what is due to us, but in which we sometimes get the whole, sometimes only part. For instance, if the fund to which our claim looks for satisfaction be the *peculium* of a son in power or a slave, and it is sufficient in amount to meet that claim, the father or master is condemned to pay the whole debt; but if it is not sufficient, the judge condemns him to pay only so far as it will go. Of the mode of ascertaining the amount of a *peculium* we will speak in its proper place.

37 So too if a woman sues for the recovery of her dowry, the rule is that the husband is to be condemned to restore it only so far as he is able, that is, so far as his means permit. Accordingly, if his means will enable him to restore the dowry in full, he will be condemned to do so; if not, he will be condemned to pay only so much as he is able. The amount of the wife's claim is also usually lessened by the husband's right of retaining some portion for himself, which he may do to the extent of any outlay he has made on dowry property, according to the rule, stated in the larger work of the Digest, that a dowry is diminished by operation of law to the extent of all
38 necessary outlay thereon. Again, if a man goes to law with

his parent or patron, or if one partner brings an action of partnership against another, he cannot get judgement for more than his adversary is able to pay. The rule is the same when a man is sued on a mere promise to give a present. Very often 39
too a plaintiff obtains judgement for less than he was owed through the defendant's pleading a set-off: for, as has already been observed, the judge, acting on equitable principles, would in such a case take into account the cross demand in the same transaction of the defendant, and condemn him only in the residue. So too if an insolvent person, who 40
surrenders all his effects to his creditors, acquires fresh property of sufficient amount to justify such a step, his creditors may sue him afresh, and compel him to satisfy the residue of their claims so far as he is able, but not to give up all that he has; for it would be inhuman to condemn a man to pay his debts in full who has already been once deprived of all his means.

TITLE VII

OF CONTRACTS MADE WITH PERSONS IN POWER

As we have already mentioned the action in respect of the *peculium* of children in power and slaves, we must now explain it more fully, and with it the other actions by which fathers and masters are sued for the debts of their sons or slaves. Whether the contract be made with a slave or with a child in power, the rules to be applied are much the same; and therefore, to make our statements as short as possible, we will speak only of slaves and masters, premising that what we say of them is true also of children and the parents in whose power they are; where the treatment of the latter differs from that of the former, we will point out the divergence.

If a slave enters into a contract at the bidding of his 1
master, the praetor allows the latter to be sued for the whole amount: for it is on his credit that the other party relies in making the contract. On the same principle the praetor 2
grants two other actions, in which the whole amount due may be sued for; that called *exercitoria*, to recover the debt of a ship-master, and that called *institoria*, to recover the debt of a manager or factor. The former lies against a master who

has appointed a slave to be captain of a ship, to recover a debt incurred by the slave in his character of captain, and it is called *exercitoria*, because the person to whom the daily profits of a ship belong is termed an *exercitor*. The latter lies against a man who has appointed a slave to manage a shop or business, to recover any debt incurred in that business; it is called *institoria*, because a person appointed to manage a business is termed an *institor*. And these actions are granted by the praetor even if the person whom one sets over a ship, a shop, or any other business, be a free man or another man's slave, because equity requires their application in these latter cases
3 no less than in the former. Another action of the praetor's introduction is that called *tributoria*. If a slave, with the knowledge of his master, devotes his *peculium* to a trade or business, the rule which the praetor follows, in respect of contracts made in the course of such trade or business, is that the *peculium* so invested and its profits shall be divided between the master, if anything is due to him, and the other creditors in the ratio of their claims. The distribution of these assets is left to the master, subject to this provision, that any creditor who complains of having received less than his proper
4 share can bring this action against him for an account. There is also an action in respect of *peculium* and of what has been converted to the uses of the master, under which, if a debt has been contracted by a slave without the consent of his master, and some portion thereof has been converted to his uses, he is liable to that extent, while if no portion has been so converted, he is liable to the extent of the slave's *peculium*. Conversion to his uses is any necessary expenditure on his account, as repayment to his creditors of money borrowed, repair of his falling house, purchase of corn for his slaves, or of an estate for him, or any other necessary. Thus, if out of ten *aurei* which your slave borrows from Titius, he pays your creditor five, and spends the remainder in some other way, you are liable for the whole of the five, and for the remainder to the extent of the *peculium*: and from this it is clear that if the whole ten were applied to your uses Titius could recover the whole from you. Thus, though it is but a single action which is brought in respect of *peculium* and of conversion to

uses, it has two condemnatory clauses. The judge by whom the action is tried first looks to see whether there has been any application to the uses of the master, and does not proceed to ascertain the amount of the *peculium* unless there has been no such application, or a partial application only. In ascertaining the amount of the *peculium* deduction is first made of what is owed to the master or any person in his power, and the residue only is treated as *peculium*; though sometimes what a slave owes to a person in his master's power is not deducted, for instance, where that person is another slave who himself belongs to the *peculium*; thus, where a slave owes a debt to his own vicarial slave, its amount is not deducted from the *peculium*. There is no doubt that a person with whom a slave enters into a contract at the bidding of his master, or who can sue by the actions *exercitoria* or *institoria*, may in lieu thereof bring an action in respect of the *peculium* and of conversion to uses; but it would be most foolish of him to relinquish an action by which he may with the greatest ease recover the whole of what is owing to him under the contract, and undertake the trouble of proving a conversion to uses, or the existence of a *peculium* sufficient in amount to cover the whole of the debt. So too a plaintiff who can sue by the action called *tributoria* may sue in respect of *peculium* and conversion to uses, and sometimes the one action is the more advisable, sometimes the other. The former has this advantage, that in it the master has no priority; there is no deduction of debts owing to him, but he and the other creditors stand on precisely the same footing; while in the action in respect of *peculium* deduction is first made of debts owing to the master, who is condemned to pay over to the creditors only what then remains. On the other hand, the advantage of the action in respect of *peculium* is that in it the slave's whole *peculium* is liable to his creditors, whereas in the action called *tributoria* only so much of it is liable as is invested in the trade or business; and this may be only a third, a fourth, or even a less fraction, because the slave may have the rest invested in land or slaves, or out on loan. A creditor ought therefore to select the one or the other action by considering their respective advantages in each particular case; though he certainly ought

to choose that in respect of conversion to uses, if he can prove
6 such conversion. What we have said of the liability of a master on the contracts of his slave is equally applicable where the contract is made by a child or grandchild in the power of his
7 or her father or grandfather. A special enactment in favour of children in power is found in the senatusconsult of Macedo, which has prohibited the giving of loans of money to such persons, and refused an action to the lender both against the child, whether he be still in power, or has become independent by death of the ancestor or emancipation, and against the parent, whether he still retains the child in his power, or has emancipated him. This enactment was made by the Senate because it was found that persons in power, when dragged down by the burden of loans which they had squandered in profligacy, often plotted against the lives of their parents.

8 Finally, it should be observed that where a contract has been entered into by a slave or son in power at his master's or parent's bidding, or where there has been a conversion to his uses, a condiction may be brought directly against the parent or master, exactly as if he had been the original contracting party in person. So too, wherever a man is suable by either of the actions called *exercitoria* and *institoria*, he may, in lieu thereof, be sued directly by a condiction, because in effect the contract in such cases is made at his bidding.

TITLE VIII

OF NOXAL ACTIONS

Where a delict, such as theft, robbery, unlawful damage, or outrage, is committed by a slave, a noxal action lies against the master, who on being condemned has the option of paying the damages awarded, or surrendering the slave in satis-
1 faction of the injury. The wrongdoer, that is, the slave, is called '*noxa*'; '*noxia*' is the term applied to the wrong
2 itself, that is, the theft, damage, robbery, or outrage. This principle of noxal surrender in lieu of paying damages awarded is based on most excellent reason, for it would be unjust that the misdeed of a slave should involve his master
3 in any detriment beyond the loss of his body. If a master is sued by a noxal action on the ground of his slave's delict, he

is released from all liability by surrendering the slave in satisfaction of the wrong, and by this surrender his right of ownership is permanently transferred; though if the slave can procure enough money to compensate the surrenderee in full for the wrong he did him, he can, by applying to the praetor, get himself manumitted even against the will of his new master. Noxal actions were introduced partly by statute, 4
partly by the Edict of the praetor; for theft, by the statute of the Twelve Tables; for unlawful damage, by the lex Aquilia; for outrage and robbery, by the Edict. Noxal actions always 5
follow the person of the wrongdoer. Thus, if your slave does a wrong while in your power, an action lies against you; if he becomes the property of some other person, that other is the proper person to be sued; and if he is manumitted, he becomes directly and personally liable, and the noxal action is extinguished. Conversely, a direct action may change into noxal; thus, if an independent person has done a wrong, and then becomes your slave (as he may in several ways described in the first Book), a noxal action lies against you in lieu of the direct action which previously lay against the wrongdoer in person. But no action lies for an offence committed by a 6
slave against his master, for between a master and a slave in his power there can be no obligation; consequently, if the slave becomes the property of some other person, or is manumitted, neither he nor his new master can be sued; and on the same principle, if another man's slave commits a wrong against you, and then becomes your property, the action is extinguished, because it has come into a condition in which an action cannot exist; the result being that even if the slave passes again out of your power you cannot sue. Similarly, if a master commits a wrong against his slave, the latter cannot sue him after manumission or alienation. These rules 7
were applied by the ancients to wrongs committed by children in power no less than by slaves; but the feeling of modern times has rightly rebelled against such inhumanity, and noxal surrender of children under power has quite gone out of use. Who could endure in this way to give up a son, still more a daughter, to another, whereby the father would be exposed to greater anguish in the person of a son than even the latter

himself, while mere decency forbids such treatment in the case of a daughter? Accordingly, noxal actions are permitted only where the wrongdoer is a slave, and indeed we find it often laid down by old legal writers that sons in power may be sued personally for their own delicts.

TITLE IX

OF PAUPERIES, OR DAMAGE DONE BY QUADRUPEDS

A noxal action was granted by the statute of the Twelve Tables in cases of mischief done through wantonness, passion, or ferocity, by irrational animals; it being by an enactment of that statute provided, that if the owner of such an animal is ready to surrender it as compensation for the damage, he shall thereby be released from all liability. Examples of the application of this enactment may be found in kicking by a horse, or goring by a bull, known to be given that way; but the action does not lie unless in causing the damage the animal is acting contrary to its natural disposition; if its nature be to be savage, this remedy is not available. Thus, if a bear runs away from its owner, and causes damage, the quondam owner cannot be sued, for immediately with its escape his ownership ceased to exist. The term *pauperies*, or 'mischief', is used to denote damage done without there being any wrong in the doer of it, for an unreasoning animal cannot be said to have done a wrong. Thus far as to the noxal action.

1 It is, however, to be observed that the Edict of the aedile forbids dogs, boars, bears, or lions to be kept near where there is a public road, and directs that if any injury be caused to a free man through disobedience of this provision, the owner of the beast shall be condemned to pay such sum as to the judge shall seem fair and equitable: in case of any other injury the penalty is fixed at double damages. Besides this aedilician action, that on *pauperies* may also be sometimes brought against the same defendant; for when two or more actions, especially penal ones, may be brought on one and the same ground, the bringing of one does not debar the plaintiff from subsequently bringing the other.

Title X

OF PERSONS THROUGH WHOM WE CAN BRING AN ACTION

We must now remark that a man may sue either for himself, or for another as attorney, guardian, or curator: whereas formerly one man could not sue for another except in public suits, as an assertor of freedom, and in certain actions relating to guardianship. The lex Hostilia subsequently permitted the bringing of an action of theft on behalf of persons who were in the hands of an enemy, or absent on State employment, and their pupils. It was, however, found extremely inconvenient to be unable to either bring or defend an action on behalf of another, and accordingly men began to employ attorneys for this purpose; for people are often hindered by ill-health, age, unavoidable absence, and many other causes from attending to their own business. For the appointment 1
of an attorney no set form of words is necessary, nor need it be made in the presence of the other party, who indeed usually knows nothing about it; for in law any one is your attorney whom you allow to bring or defend an action on your behalf. The modes of appointing guardians and curators 2
have been explained in the first Book.

Title XI

OF SECURITY

The old system of taking security from litigants differed from that which has more recently come into use.

Formerly the defendant in a real action was obliged to give security, so that if judgement went against him, and he neither gave up the property which was in question, nor paid the damages assessed, the plaintiff might be able to sue either him or his sureties: and this is called security for satisfaction of judgement, because the plaintiff stipulates for payment to himself of the sum at which the damages are assessed. And there was all the more reason for compelling the defendant in a real action to give security if he was merely the representative of another. From the plaintiff in a real action no security was

required if it was on his own account that he sued, but if he was merely an attorney, he was required to give security for the ratification of his proceedings by his principal, owing to the possibility of the latter's subsequently suing in person on the same claim. Guardians and curators were required by the Edict to give the same security as attorneys; but when they appeared as plaintiffs they were sometimes excused.
1 So much for real actions. In personal actions the same rules applied, so far as the plaintiff was concerned, as we have said obtained in real actions. If the defendant was represented by another person, security had always to be given, for no one is allowed to defend another without security; but if the defendant was sued on his own account, he was not compelled to give security for satisfaction of judgement.
2 Nowadays, however, the practice is different; for if the defendant is sued on his own account, he is not compelled to give security for payment of the damages assessed, whether the action be real or personal; all that he has to do is to enter into a personal engagement that he will subject himself to the jurisdiction of the court down to final judgement; the mode of making such engagement being either a promise under oath, which is called a sworn recognizance, or a bare promise, or giving of sureties, according to the defendant's
3 rank and station. But the case is different where either plaintiff or defendant appears by an attorney. If the plaintiff does so, and the attorney's appointment is not enrolled in the records, or confirmed by the principal personally in court, the attorney must give security for ratification of his proceedings by his principal; and the rule is the same if a guardian, curator, or other person who has undertaken the management
4 of another's affairs brings an action through an attorney. If a defendant appears, and is ready to appoint an attorney to defend the action for him, he can do this either by coming personally into court, and confirming the appointment by the solemn stipulations employed when security is given for satisfaction of judgement, or by giving security out of court whereby, as surety for his attorney, he guarantees the observance of all the clauses of the so-called security for satisfaction of judgement. In all such cases he is obliged to give a right

of hypothec over all his property, whether the security be given in or out of court, and this right avails against his heirs no less than against himself. Finally, he has to enter into a personal engagement or recognizance to appear in court when judgement is delivered; and in default of such appearance his surety will have to pay all the damages to which he is condemned, unless notice of appeal is given. If, however, 5 the defendant for some reason or other does not appear, and another will defend for him, he may do so, and it is immaterial whether the action be real or personal, provided he will give security for satisfaction of the judgement in full; for we have already mentioned the old rule, that no one is allowed to defend another without security. All this will appear 6 more clearly and fully by reference to the daily practice of the courts, and to actual cases of litigation: and it is 7 our pleasure that these rules shall hold not only in this our royal city, but also in all our provinces, although it may be that through ignorance the practice elsewhere was different; for it is necessary that the provinces generally shall follow the lead of the capital of all our empire, that is, of this royal city, and observe its usages.

TITLE XII

OF ACTIONS PERPETUAL AND TEMPORAL, AND WHICH MAY BE BROUGHT BY AND AGAINST HEIRS

It should be here observed that actions founded on statutes, senatusconsults, and imperial constitutions could be brought at any length of time from the accrual of the cause of action, until certain limits were fixed for actions both real and personal by imperial enactments; while actions which were introduced by the praetor in the exercise of his jurisdiction could, as a rule, be brought only within a year, that being the duration of his authority. Some praetorian actions, however, are perpetual, that is to say, can be brought at any time which does not exceed the limit fixed by the enactments referred to; for instance, those granted to 'possessors of goods' and other persons who are fictitiously represented as heirs. So, too, the action for theft detected in the commission, though praetorian, is perpetual, the praetor having judged it absurd

1 to limit it by a year. Actions which will lie against a man under either the civil or the praetorian law will not always lie against his heir, the rule being absolute that for delict—for instance, theft, robbery, outrage, or unlawful damage—no penal action can be brought against the heir. The heir of the person wronged, however, may bring these actions, except in outrage, and similar cases, if any. Sometimes, even an action on contract cannot be brought against the heir; this being the case where the testator has been guilty of fraud, and his heir has not profited thereby. If, however, a penal action, such as those we have mentioned, has been actually commenced by the original parties, it is transmitted to the heirs of each.
2 Finally, it must be remarked that if, before judgement is pronounced, the defendant satisfies the plaintiff, the judge ought to absolve him, even though he was liable to condemnation at the time when the action was commenced; this being the meaning of the old dictum, that all actions involve the power of absolution.

TITLE XIII

OF EXCEPTIONS

We have next to examine the nature of exceptions. Exceptions are intended for the protection of the defendant, who is often in this position, that though the plaintiff's case is a good one in the abstract, yet as against him, the particular
1 defendant, his contention is inequitable. For instance, if you are induced by duress, fraud, or mistake to promise Titius by stipulation what you did not owe him, it is clear that by the civil law you are bound, and that the action on your promise is well grounded; yet it is inequitable that you should be condemned, and therefore in order to defeat the action you are allowed to plead the exception of duress, or of fraud, or
2 one framed to suit the circumstances of the case. So too, if, as a preliminary to an advance of money, one stipulates from you for its repayment, and then never advances it after all, it is clear that he can sue you for the money, and you are bound by your promise to give it; but it would be iniquitous that you should be compelled to fulfil such an engagement, and therefore you are permitted to defend yourself by the

exception that the money, in point of fact, was never advanced. The time within which this exception can be pleaded, as we remarked in a former Book, has been shortened by our constitution. Again, if a creditor agrees with his debtor not to 3
sue for a debt, the latter still remains bound, because an obligation cannot be extinguished by a bare agreement; accordingly, the creditor can validly bring against him a personal action claiming payment of the debt, though, as it would be inequitable that he should be condemned in the face of the agreement not to sue, he may defend himself by pleading such agreement in the form of an exception. Similarly, if at 4
his creditor's challenge a debtor affirms on oath that he is not under an obligation to convey, he still remains bound; but as it would be unfair to examine whether he has perjured himself, he can, on being sued, set up the defence that he has sworn to the non-existence of the debt. In real actions, too, exceptions are equally necessary; thus, if on the plaintiff's challenge the defendant swears that the property is his, there is nothing to prevent the former from persisting in his action; but it would be unfair to condemn the defendant, even though the plaintiff's contention that the property is his be well founded. Again, an obligation still subsists even after judge- 5
ment in an action, real or personal, in which you have been defendant, so that in strict law you may be sued again on the same ground of action; but you can effectually meet the claim by pleading the previous judgement. These examples 6
will have been sufficient to illustrate our meaning; the multitude and variety of the cases in which exceptions are necessary may be learnt by reference to the larger work of the Digest or Pandects. Some exceptions derive their force from 7
statutes or enactments equivalent to statutes, others from the jurisdiction of the praetor; and some are said to be perpetual 8
or peremptory, others to be temporary or dilatory. Perpetual 9
or peremptory exceptions are obstructions of unlimited duration, which practically destroy the plaintiff's ground of action, such as the exceptions of fraud, intimidation, and agreement never to sue. Temporary or dilatory exceptions are merely 10
temporary obstructions, their only effect being to postpone for a while the plaintiff's right to sue; for example, the plea of

an agreement not to sue for a certain time, say, five years; for at the end of that time the plaintiff can effectually pursue his remedy. Consequently persons who would like to sue before the expiration of the time, but are prevented by the plea of an agreement to the contrary, or something similar, ought to postpone their action till the time specified has elapsed; and it is on this account that such exceptions are called dilatory. If a plaintiff brought his action before the time had expired, and was met by the exception, this would debar him from all success in those proceedings, and formerly he was unable to sue again, owing to his having rashly brought the matter into court, whereby he consumed his right of action, and lost all chance of recovering what was his due. Such unbending rules, however, we do not at the present day approve. Plaintiffs who venture to commence an action before the time agreed upon, or before the obligation is yet actionable, we subject to the constitution of Zeno, which that most sacred legislator enacted as to over-claims in respect of time; whereby, if the plaintiff does not observe the stay which he has voluntarily granted, or which is implied in the very nature of the action, the time during which he ought to have postponed his action shall be doubled, and at its termination the defendant shall not be suable until he has been reimbursed for all expenses hitherto incurred. So heavy a penalty it is hoped will induce plaintiffs
11 in no case to sue until they are entitled. Moreover, some personal incapacities produce dilatory exceptions, such as those relating to agency, supposing that a party wishes to be represented in an action by a soldier or a woman; for soldiers may not act as attorneys in litigation even on behalf of such near relatives as a father, mother, or wife, not even in virtue of an imperial rescript, though they may attend to their own affairs without committing a breach of discipline. We have sanctioned the abolition of those exceptions, by which the appointment of an attorney was formerly opposed on account of the infamy of either attorney or principal, because we found that they no longer were met with in actual practice, and to prevent the trial of the real issue being delayed by disputes as to their admissibility and operation.

Title XIV

OF REPLICATIONS

Sometimes an exception, which *prima facie* seems just to the defendant, is unjust to the plaintiff, in which case the latter must protect himself by another allegation called a replication, because it parries and counteracts the force of the exception. For example, a creditor may have agreed with his debtor not to sue him for money due, and then have subsequently agreed with him that he shall be at liberty to do so; here if the creditor sues, and the debtor pleads that he ought not to be condemned on proof being given of the agreement not to sue, he bars the creditor's claim, for the plea is true, and remains so in spite of the subsequent agreement; but as it would be unjust that the creditor should be prevented from recovering, he will be allowed to plead a replication, based upon that agreement. Sometimes again a replication, though *prima* 1
facie just, is unjust to the defendant; in which case he must protect himself by another allegation called a rejoinder: and 2
if this again, though on the face of it just, is for some reason unjust to the plaintiff, a still further allegation is necessary for his protection, which is called a surrejoinder. And some- 3
times even further additions are required by the multiplicity of circumstances under which dispositions are made, or by which they are subsequently affected; as to which fuller information may easily be gathered from the larger work of the Digest. Exceptions which are open to a defendant are 4
usually open to his surety as well, as indeed is only fair: for when a surety is sued the principal debtor may be regarded as the real defendant, because he can be compelled by the action on agency to repay the surety whatsoever he has disbursed on his account. Accordingly, if the creditor agrees with his debtor not to sue, the latter's sureties may plead this agreement, if sued themselves, exactly as if the agreement had been made with them instead of with the principal debtor. There are, however, some exceptions which, though pleadable by a principal debtor, are not pleadable by his surety; for instance, if a man surrenders his property to his creditors as an insolvent, and one of them sues him for his

debt in full, he can effectually protect himself by pleading the surrender; but this cannot be done by his surety, because the creditor's main object, in accepting a surety for his debtor, is to be able to have recourse to the surety for the satisfaction of his claim if the debtor himself becomes insolvent.

TITLE XV

OF INTERDICTS

We have next to treat of interdicts or of the actions by which they have been superseded. Interdicts were formulae by which the praetor either ordered or forbad some thing to be done, and occurred most frequently in case of litigation about possession or quasi-possession.

1 The first division of interdicts is into orders of abstention, of restitution, and of production. The first are those by which the praetor forbids the doing of some act—for instance, the violent ejection of a bona fide possessor, forcible interference with the interment of a corpse in a place where that may lawfully be done, building upon sacred ground, or the doing of anything in a public river or on its banks which may impede its navigation. The second are those by which he orders restitution of property, as where he directs possession to be restored to a 'possessor of goods' of things belonging to an inheritance, and which have hitherto been in the possession of others under the title of heir, or without any title at all; or where he orders a person to be reinstated in possession of land from which he has been forcibly ousted. The third are those by which he orders the production of persons or property; for instance, the production of a person whose freedom is in question, of a freedman whose patron wishes to demand from him certain services, or of children on the application of the parent in whose power they are. Some think that the term interdict is properly applied only to orders of abstention, because it is derived from the verb *interdicere*, meaning to denounce or forbid, and that orders of restitution or production are properly termed decrees; but in practice they are all called interdicts, because they are given *inter*
2 *duos*, between two parties. The next division is into inter-

dicts for obtaining possession, for retaining possession, and for recovering possession. Interdicts for obtaining possession are 3
exemplified by the one given to a 'possessor of goods', which is called *Quorum bonorum*, and which enjoins that whatever portion of the goods, whereof possession has been granted to the claimant, is in the hands of one who holds by the title of heir or as mere possessor only, shall be delivered up to the grantee of possession. A person is deemed to hold by the title of heir who thinks he is an heir; he is deemed to hold as mere possessor who relies on no title at all, but holds a portion of the whole of the inheritance, knowing that he is not entitled. It is called an interdict for obtaining possession, because it is available only for initiating possession; accordingly, it is not granted to a person who has already had and lost possession. Another interdict for obtaining possession is that named after Salvius, by which the landlord gets possession of the tenant's property which has been hypothecated as a security for rent. The interdicts *Uti possidetis* and 4
Utrubi are interdicts for retaining possession, and are employed when two parties claim ownership in anything, in order to determine which shall be defendant and which plaintiff; for no real action can be commenced until it is ascertained which of the parties is in possession, because law and reason both require that one of them shall be in possession and shall be sued by the other. As the rôle of defendant in a real action is far more advantageous than that of plaintiff, there is almost invariably a keen dispute as to which party is to have possession pending litigation: the advantage consisting in this, that, even if the person in possession has no title as owner, the possession remains to him unless and until the plaintiff can prove his own ownership: so that where the rights of the parties are not clear, judgement usually goes against the plaintiff. Where the dispute relates to the possession of land or buildings, the interdict called *Uti possidetis* is employed; where to movable property, that called *Utrubi*. Under the older law their effects were very different. In *Uti possidetis* the party in possession at the issue of the interdict was the winner, provided he had not obtained that possession from his adversary by force, or clandestinely, or by per-

mission; whether he had obtained it from some one else in any of these modes was immaterial. In *Utrubi* the winner was the party who had been in possession the greater portion of the year next immediately preceding, provided that possession had not been obtained by force, or clandestinely, or by permission, from his adversary. At the present day, however, the practice is different, for as regards the right to immediate possession the two interdicts are now on the same footing; the rule being, that whether the property in question be movable or immovable, the possession is adjudged to the party who has it at the commencement of the action, provided he had not obtained it by force, or clandestinely, or
5 by permission, from his adversary. A man's possession includes, besides his own personal possession, the possession of any one who holds in his name, though not subject to his power; for instance, his tenant. So also a depositary or borrower for use may possess for him, as is expressed by the saying that we retain possession by any one who holds in our name. Moreover, mere intention suffices for the retention of possession; so that although a man is not in actual possession either himself or through another, yet if it was not with the intention of abandoning the thing that he left it, but with that of subsequently returning to it, he is deemed not to have parted with the possession. Through what persons we can obtain possession has been explained in the second Book; and it is agreed on all hands that for obtaining possession
6 intention alone does not suffice. An interdict for recovering possession is granted to persons who have been forcibly ejected from land or buildings; their proper remedy being the interdict *Unde vi*, by which the ejector is compelled to restore possession, even though it had been originally obtained from him by the grantee of the interdict by force, clandestinely, or by permission. But by imperial constitutions, as we have already observed, if a man violently seizes on property to which he has a title, he forfeits his right of ownership; if on property which belongs to some one else, he has not only to restore it, but also to pay the person whom he has violently dispossessed a sum of money equivalent to its value. In cases of violent dispossession the wrongdoer is liable under the lex

Iulia relating to private or public violence, by the former being meant unarmed force, by the latter dispossession effected with arms; and the term 'arms' must be taken to include not only shields, swords, and helmets, but also sticks and stones. Thirdly, interdicts are divided into simple and 7
double. Simple interdicts are those wherein one party is plaintiff and the other defendant, as is always the case in orders of restitution or production; for he who demands restitution or production is plaintiff, and he from whom it is demanded is defendant. Of interdicts which order abstention some are simple, others double. The simple are exemplified by those wherein the praetor commands the defendant to abstain from desecrating consecrated ground, or from obstructing a public river or its banks; for he who demands such order is the plaintiff, and he who is attempting to do the act in question is defendant. Of double interdicts we have examples in *Uti possidetis* and *Utrubi*; they are called double because the footing of both parties is equal, neither being exclusively plaintiff or defendant, but each sustaining the double rôle.

To speak of the procedure and result of interdicts under 8
the older law would now be a waste of words; for when the procedure is what is called 'extraordinary', as it is nowadays in all actions, the issue of an interdict is unnecessary, the matter being decided without any such preliminary step in much the same way as if it had actually been taken, and a modified action had arisen on it.

Title XVI

OF THE PENALTIES FOR RECKLESS LITIGATION

It should here be observed that great pains have been taken by those who in times past had charge of the law to deter men from reckless litigation, and this is a thing that we too have at heart. The best means of restraining unjustifiable litigation, whether on the part of a plaintiff or of a defendant, are money fines, the employment of the oath, and the fear of infamy. Thus, under our constitution, the oath 1
has to be taken by every defendant, who is not permitted

even to state his defence until he swears that he resists the plaintiff's claim because he believes that his cause is a good one. In certain cases where the defendant denies his liability the action is for double or treble the original claim, as in proceedings on unlawful damage, and for recovery of legacies bequeathed to religious places. In various actions the damages are multiplied at the outset; in an action on theft detected in the commission they are quadrupled; for simple theft they are doubled; for in these and some other actions the damages are a multiple of the plaintiff's loss, whether the defendant denies or admits the claim. Vexatious litigation is checked on the part of the plaintiff also, who under our constitution is obliged to swear on oath that his action is commenced in good faith; and similar oaths have to be taken by the advocates of both parties, as is prescribed in other of our enactments. Owing to these substitutes the old action of dishonest litigation has become obsolete. The effect of this was to penalize the plaintiff in a tenth part of the value he claimed by action; but, as a matter of fact, we found that the penalty was never exacted, and therefore its place has been taken by the oath above mentioned, and by the rule that a plaintiff who sues without just cause must compensate his opponent for all losses incurred, and also pay the costs of the
2 action. In some actions condemnation carries infamy with it, as in those on theft, robbery, outrage, fraud, guardianship, agency, and deposit, if direct, not contrary; also in the action on partnership, which is always direct, and in which infamy is incurred by any partner who suffers condemnation. In actions on theft, robbery, outrage, and fraud, it is not only infamous to be condemned, but also to compound, as indeed is only just; for obligation based on delict differs widely from obligation based on contract.

3 In commencing an action, the first step depends upon that part of the Edict which relates to summons; for before anything else is done, the adversary must be summoned, that is to say, must be called before the judge who is to try the action. And herein the praetor takes into consideration the respect due to parents, patrons, and the children and parents of patrons, and refuses to allow a parent to be summoned by his

child, or a patron by his freedman, unless permission so to do has been asked of and obtained from him; and for non-observance of this rule he has fixed a penalty of fifty *solidi*.

Title XVII

OF THE DUTIES OF A JUDGE

Finally, we have to treat of the duties of a judge; of which the first is not to judge contrary to statutes, the imperial laws, and custom. Accordingly, if he is trying a noxal action, and 1
thinks that the master ought to be condemned, he should be careful to word his judgement thus: 'I condemn Publius Maevius to pay ten *aurei* to Lucius Titius, or to surrender to him the slave that did the wrong.' If the action is real, and he 2
finds against the plaintiff, he ought to absolve the defendant; if against the latter, he ought to order him to give up the property in question, along with its fruits. If the defendant pleads that he is unable to make immediate restitution and applies for execution to be stayed, and such application appears to be in good faith, it should be granted upon the terms of his finding a surety to guarantee payment of the damages assessed, if restitution be not made within the time allowed. If the subject of the action be an inheritance, the same rule applies as regards fruits as we laid down in speaking of actions for the recovery of single objects. If the defendant is a mala fide possessor, fruits which but for his own negligence he might have gathered are taken into account in much the same way in both actions; but a bona fide possessor is not held answerable for fruits which he has not consumed or has not gathered, except from the moment of the commencement of the action, after which time account is taken as well of fruits which might have been gathered but for his negligence as of those which have been gathered and consumed. If the 3
object of the action be production of property, its mere production by the defendant is not enough, but it must be accompanied by every advantage derived from it; that is to say, the plaintiff must be placed in the same position he would have been in if production had been made immediately on the commencement of the action. Accordingly if, during the

delay occasioned by trial, the possessor has completed a title to the property by usucapion, he will not be thereby saved from being condemned. The judge ought also to take into account the mesne profits, or fruits produced by the property in the interval between the commencement of the action and judgement. If the defendant pleads that he is unable to make immediate production, and applies for a stay, and such application appears to be in good faith, it should be granted on his giving security that he will render up the property. If he neither complies at once with the judge's order for production, nor gives security for doing so afterwards, he ought to be condemned in a sum representing the plaintiff's interest in having production at the commence-
4 ment of the proceedings. In an action for the division of a 'family' the judge ought to assign to each of the heirs specific articles belonging to the inheritance, and if one of them is unduly favoured, to condemn him, as we have already said, to pay a fixed sum to the other as compensation. Again, the fact that one only of two joint-heirs has gathered the fruits of land comprised in the inheritance, or has damaged or consumed something belonging thereto, is ground for ordering him to pay compensation to the other; and it is immaterial, so far as this action is concerned, whether the joint-heirs are
5 only two or more in number. The same rules are applied in an action for partition of a number of things held by joint-owners. If such an action be brought for the partition of a single object, such as an estate, which easily admits of division, the judge ought to assign a specific portion to each joint-owner, condemning such one as seems to be unduly favoured to pay a fixed sum to the other as compensation. If the property cannot be conveniently divided—as a slave, for instance, or a mule—it ought to be adjudged entirely to one only of the joint-owners, who should be ordered to pay a fixed
6 sum to the other as compensation. In an action for rectification of boundaries the judge ought to examine whether an adjudication of property is actually necessary. There is only one case where this is so; where, namely, convenience requires that the line of separation between fields belonging to different owners shall be more clearly marked than heretofore, and

where, accordingly, it is requisite to adjudge part of the one's field to the owner of the other, who ought, in consequence, to be ordered to pay a fixed sum as compensation to his neighbour. Another ground for condemnation in this action is the commission of any malicious act, in respect of the boundaries, by either of the parties, such as removal of landmarks, or cutting down boundary trees: as also is contempt of court, expressed by refusal to allow the fields to be surveyed in accordance with a judge's order. Wherever property is adjudged to a 7
party in any of these actions, he at once acquires a complete title thereto.

TITLE XVIII

OF PUBLIC PROSECUTIONS

Public prosecutions are not commenced as actions are, nor indeed is there any resemblance between them and the other remedies of which we have spoken; on the contrary, they differ greatly both in the mode in which they are commenced, and in the rules by which they are conducted. They are 1
called public because as a general rule any citizen may come forward as prosecutor in them. Some are capital, others not. 2
By capital prosecutions we mean those in which the accused may be punished with the extremest severity of the law, with interdiction from water and fire, with deportation, or with hard labour in the mines: those which entail only infamy and pecuniary penalties are public, but not capital. The follow- 3
ing statutes relate to public prosecutions. First, there is the lex Iulia on treason, which includes any design against the Emperor or State; the penalty under it is death, and even after decease the guilty person's name and memory are branded with infamy. The lex Iulia, passed for the repression 4
of adultery, punishes with death not only defilers of the marriage-bed, but also those who indulge in criminal intercourse with those of their own sex, and inflicts penalties on any who without using violence seduce virgins or widows of respectable character. If the seducer be of reputable condition, the punishment is confiscation of half his fortune; if a mean person, flogging and relegation. The lex Cornelia on 5
assassination pursues those persons, who commit this crime,

with the sword of vengeance, and also all who carry weapons for the purpose of homicide. By a 'weapon', as is remarked by Gaius in his commentary on the statute of the Twelve Tables, is ordinarily meant some missile shot from a bow, but it also signifies anything thrown with the hand; so that stones and pieces of wood or iron are included in the term. '*Telum*,' in fact, or 'weapon', is derived from the Greek τηλοῦ, and so means anything thrown to a distance. A similar connexion of meaning may be found in the Greek word βέλος, which corresponds to our *telum*, and which is derived from βάλλεσθαι, to throw, as we learn from Xenophon, who writes, 'they carried with them βέλη, namely spears, bows and arrows, slings, and large numbers of stones.' *Sicarius*, or assassin, is derived from *sica*, a long steel knife. This statute also inflicts punishment of death on poisoners, who kill men by their hateful arts of poison
6 and magic, or who publicly sell deadly drugs. A novel penalty has been devised for a most odious crime by another statute, called the lex Pompeia on parricide, which provides that any person who by secret machination or open act shall hasten the death of his parent, or child, or other relation whose murder amounts in law to parricide, or who shall be an instigator or accomplice of such crime, although a stranger, shall suffer the penalty of parricide. This is not execution by the sword or by fire, or any ordinary form of punishment, but the criminal is sewn up in a sack with a dog, a cock, a viper, and an ape, and in this dismal prison is thrown into the sea or a river, according to the nature of the locality, in order that even before death he may begin to be deprived of the enjoyment of the elements, the air being denied him while alive, and interment in the earth when dead. Those who kill persons related to them by kinship or affinity, but whose murder is not parricide, will suffer the penalties of the lex Cornelia on
7 assassination. The lex Cornelia on forgery, otherwise called the statute of wills, inflicts penalties on all who shall write, seal, or read a forged will or other document, or shall substitute the same for the real original, or who shall knowingly and feloniously make, engrave, or use a false seal. If the criminal be a slave, the penalty fixed by the statute is death, as in the statute relating to assassins and poisoners: if a free man, de-

portation. The lex Iulia, relating to public or private violence, 8
deals with those persons who use force armed or unarmed. For the former, the penalty fixed by the statute is deportation; for the latter, confiscation of one third of the offender's property. Ravishment of virgins, widows, persons professed in religion, or others, and all assistance in its perpetration, is punished capitally under the provisions of our constitution, by reference to which full information on this subject is obtainable. The lex Iulia on embezzlement punishes all who steal money 9
or other property belonging to the State, or devoted to the maintenance of religion. Judges who during their term of office embezzle public money are punishable with death, as also are their aiders and abettors, and any who receive such money knowing it to have been stolen. Other persons who violate the provisions of this statute are liable to deportation. A public prosecution may also be brought under the lex Fabia 10
relating to manstealing, for which a capital penalty is sometimes inflicted under imperial constitutions, sometimes a lighter punishment. Other statutes which give rise to such prosecu- 11
tions are the lex Iulia on bribery, and three others, which are similarly entitled, and which relate to judicial extortion, to illegal combinations for raising the price of corn, and to negligence in the charge of public moneys. These deal with special varieties of crime, and the penalties which they inflict on those who infringe them in no case amount to death, but are less severe in character.

We have made these remarks on public prosecutions only to 12
enable you to have the merest acquaintance with them, and as a kind of guide to a fuller study of the subject, which, with the assistance of Heaven, you may make by reference to the larger volume of the Digest or Pandects.

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THE END.

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